Aquatic Resources Policy Implementation Manual

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WASHINGTON STATE DEPARTMENT OF
Natural Resources
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Chapter 1: Introduction

Washington's state-owned aquatic lands are an extremely valuable – but often overlooked – natural resource. For more than 100 years, our state's aquatic environmental resources have suffered from the direct and indirect effects of human development. Developments large and small — mills, marinas, bulkheads, outfalls, docks, factories, condominiums and more — all alter the aquatic landscape and, too often, degrade the aquatic environment.

The state Legislature has recognized these lands as "an irreplaceable public heritage." The Department of Natural Resources (the department) is responsible for managing these lands for the benefit of the public, and for protecting and enhancing our state's legacy of aquatic natural resources for generations to come.

Decisions the department makes today will affect state-owned aquatic lands, and the benefits they provide for the public, for many years. As a proprietary manager rather than a regulator, the department is in a unique position to broadly address all important issues. It also must balance multiple and sometimes conflicting responsibilities. As stewards of aquatic lands, we must ensure that the precious resources in our care are protected for today and forever.

Intent of this Manual

Often, the reality facing the department is that we are inundated with requests to lease state-owned aquatic lands, and staff must figure out how to respond. When a multitude of requests and decisions are pending and vying for attention, it can be tempting to merely give the quickest answer. It is discouraging that so often it's difficult to find the time or resources to give the best answer. This manual is intended to be used as a staff guidance document, and is designed to ask and answer at least some of the essential management questions in advance. It is also intended to clearly express the overall goals and directions for state-owned aquatic lands, and to provide succinct guidance to staff regarding many common situations.

Managing aquatic resources usually involves a series of steps resulting in a "use authorization" document. Providing good stewardship of aquatic resources, however, is far more complex than just writing these documents and completing administrative tasks. Decisions about aquatic resources and their use must take place in a larger context, looking at natural ecosystems and socioeconomic systems in their entirety, and considering not only today's people and issues, but also those of generations to come.

As the title suggests, this manual focuses on how to implement aquatic laws and policies. It offers greater detail and discussion than the laws and policies themselves, and outlines Executive Management's expectations on how to apply these laws and policies to various situations when managing state-owned aquatic lands. It describes the latitude available within the boundaries of these laws and policies to negotiate and find solutions to problems. It also provides guidance on when and how to involve Executive Management in key projects, proposals and issues.

Managing aquatic resources properly and consistently across the state requires that the laws and policies affecting these resources are clearly understood and uniformly interpreted and

implemented. This manual is designed to help department staff by outlining the standards that apply to all decisions, on both use authorization applications and other land management efforts. These standards derive directly from (in order of precedence):

1. Washington State Constitution.
2. Washington State statutes (RCWs).
3. Department rules (WACs).
4. Policies approved by the Board of Natural Resources.
5. Direction from the Commissioner of Public Lands.

This manual does not create or change any laws or policies. However, the guidance provided here may interpret existing laws and policies or may change past department practices when previous interpretations and practices have been found ineffective or insufficient for fulfilling the department's responsibilities.

The guidance presents principles and instructions to department staff from Executive Management on how to implement the laws and policies. All of these forms of guidance should be in agreement with each other. In cases of disagreement, however, they rank in the following order:

1. Explicit direction or instructions on a specific issue from Executive Management.

2. *The Aquatic Resources Policy Implementation Manual.*

3. Memoranda of Understanding or Memoranda of Agreement with other agencies approved by the Commissioner or by a Division or Region Manager.

4. Aquascape or other aquatic land use plans approved by the Commissioner or by a Division or Region Manager.

How to use this manual

This introductory chapter provides the context for all decisions regarding aquatic resources. In reading this section, staff will understand the vision and guiding principles critical to keep in mind when considering what should or should not occur on state-owned aquatic lands.

The second section describes in greater detail the roles and responsibilities for making aquatic resources decisions.

The third section is set up much like a reference book, and presents and discusses aquatic-related laws and topics. The topics are arranged alphabetically, with the applicable RCWs and WACs presented first, followed by discussion and specific guidance.

While constitutional provisions, laws, rules and policies are the formal standards for managing state-owned aquatic lands, department staff are expected to use their best professional judgement in applying these standards to daily aquatic land management activities. In other words, staff must try to answer "how can we best apply the law to this circumstance?"

It is anticipated that staff will use this document as both a desk manual and a field manual. It was purposely designed to be portable, as well as easily updated. Pages or entire sections can be added, deleted or revised, and supplements on new or evolving topics can be quickly accommodated. Information will be revised or added as policies are refined or developed, or as management direction evolves.

The manual is general in nature. It is not a "cookbook" or a procedural manual describing steps that staff can follow each time to answer every question. Instead, staff must take responsibility for using professional judgement in applying the general principles and guidance found here to individual cases and decisions.

This manual is only one among numerous sources of authority regarding the management responsibility for state-owned aquatic lands. Detailed procedures, such as directions on how to fill out various forms, are not included here. For procedural requirements on use authorizations, see the *Use Authorization Desk Manual* (sometimes referred to as the Gordon Thomas Honeywell manual), the *Use Authorization Training Manual*, and similar documents. Those manuals offer specific instructions and procedures on completing the appropriate documents. In some cases, procedures will need to be updated to fully express the guidance on various issues as described in this manual.

Managing State-Owned Aquatic Lands: An Overview of the Legal History

The department is responsible for managing approximately 2.6 million acres of state-owned aquatic lands. These aquatic lands include tidelands, shorelands of navigable rivers and lakes, beds of marine and fresh waters, lands in harbor areas and waterways, and even some filled aquatic lands which now look like uplands.

At statehood, the authors of the Washington State Constitution debated what to do with aquatic lands. They were greatly concerned about the possibility of a few people or corporations monopolizing harbors, which were essential to the economic health of the young state. They decided that most of this great resource should remain in public hands, as described in three key constitutional provisions.

First, the state asserted ownership of all bedlands, tidelands and shorelands of the state. (Article XVII) The federal government granted these lands to the state under the Equal Footing Doctrine, which required that new states should receive the same benefit. Second, the Constitution allowed the invalidation of earlier grants of aquatic lands made by the Territory of

Washington to railroad companies and other private parties. (Article XXVII) This was a highly unusual step, in that all other actions and laws of the Territory were continued into statehood.

Finally, the authors provided for a commission to establish harbor areas in navigable waters along the shores of cities. These harbor areas were – and still are – to be reserved "for landings, wharves, streets, and other conveniences of navigation and commerce." (Article XV) This article also states that harbor areas and the aquatic lands beyond them must never be sold or given away, thereby ensuring that the aquatic lands most necessary for economic activity would be forever controlled by the state for the benefit of the entire public.

The Constitution makes no statement supporting or prohibiting the sale of the state's tidelands and shorelands; that decision was left to the state Legislature. Between the 1890s and 1950s, the Legislature promoted the sale of these lands to encourage economic development and help fund state government. Most of the state's tidelands and much of the state's shorelands were sold into private ownership.

By the late 1950s the trend shifted to leasing aquatic lands rather than selling them. While some leasing had been done prior to statehood, leasing became much more common in order to retain the public land base and to generate a long-term stream of income to the state, rather than the one-time revenue generated from land sales.

In 1971 the Legislature eliminated the sale of tidelands and shorelands except to public entities, and also specified that aquatic lands could not be given away. Today, only 29 percent of the state's tidelands and 74 percent of the state's shorelands remain in public ownership. With minor exceptions, all of the state's bedlands remain in public ownership.

The decision to stop selling state-owned aquatic lands was a major step in the history of managing aquatic resources. It meant that the state would focus on protecting and wisely caring for our state's legacy of aquatic lands, and helped assure that this

legacy would exist in some form for future generations. It is now the department's responsibility that the legacy remain as valuable as possible.

Today, the department has the responsibility to be the steward of state-owned aquatic lands. This stewardship demands attention to many more issues and concerns than were necessary or even considered earlier in the state's history. The proposed uses of, and potential threats to, aquatic resources are now more varied and complex. The challenge to protect aquatic resources, and in many cases to restore aquatic resources which were lost or damaged, is greater than ever. Meeting this challenge is also more urgent than ever, if we are to preserve and enhance our state's increasingly rare and valuable legacy of aquatic lands.

The Aquatic Lands Act

In 1984, the Legislature ensured protection of the aquatic legacy with the passage of the Aquatic Lands Act. It is the most comprehensive and powerful statement in law on the management of state-owned aquatic lands. These statutes contain four key elements:

- The overall philosophy for the management of state-owned aquatic lands.
- The framework for setting lease rates.
- The framework for ports to assume responsibility for the management of certain state-owned aquatic lands.
- The creation of the Aquatic Lands Enhancement Account (ALEA).

The philosophy established by the Act is much more broad-reaching and protective of aquatic resources than any previous statutes. To assure that the basic nature of our aquatic areas does not change, the Act specifies that aquatic lands should be dedicated to uses that *must* be on the water, rather than activities such as factories or office buildings that could be located elsewhere. Also, the Legislature fostered access to and

protection of aquatic lands by dedicating revenue from these lands to enhancement projects and improved management efforts.

The Legislature recognized that state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage. The Legislature also recognized that, in addition to economic development of aquatic lands, environmental protection, public use, and renewable resources are critical public benefits.

These public benefits provide the fundamental basis for decisions regarding state-owned aquatic lands. The department is dedicated to taking all possible measures within its authority to protect the aquatic environment. But, even as the department strives to provide for the other benefits of state-owned aquatic lands, environmental protection must be in the forefront of all decisions.

The department acts as a manager who has the authority to lease the land to tenants on behalf of the owners: the current and future citizens of the state. However, the Legislature directed the department to consider the natural values of state-owned aquatic lands as wildlife habitat, natural area preserve, representative ecosystem, or spawning area prior to issuing any initial lease or authorizing any change in use.

Therefore, of all the things the department may wish to consider before granting a use authorization, the only qualities of state-owned aquatic lands the department is actually mandated by statute to consider are these "natural values." After considering these natural values, the department has clear direction to protect them, through either withholding lands from leasing or requiring conditions necessary for their protection within a lease. As part of ensuring environmental protection, the department can and will strongly protect the natural values of state-owned aquatic lands through leasing decisions.

The Aquatic Vision

The Aquatic Vision, as approved by the Commissioner of Public Lands, is a non-technical statement of how important aquatic lands are to all Washington citizens. It is a distillation of all the laws, rules and policies that govern state-owned aquatic lands into the essence of why we take on this difficult task: to protect our natural legacy of aquatic resources and pass that legacy down to future generations.

All department staff in the Aquatic Resources program or who contribute to aquatic lands management should periodically take the time to read and reflect on the Aquatic Vision. By incorporating the principles of this vision into all our daily work and each individual decision, we can achieve greater goals for the public benefit.

Aquatic Vision

Every generation of Washington citizens is responsible for protecting the natural legacy that we inherit. We are the descendants of men and women who protected this legacy for us. And one day we will be the ancestors of Washington citizens who will inherit this legacy from us.

This unbroken chain of human stewardship began in our state long before recorded history, when Indian tribes made their livelihoods from the lands, rivers, and shores of our state. It continued when Washington became a state more than a century ago. Every generation has faced the challenge of finding the balance between satisfying the needs of the present and the needs of the future. As the population of our state has grown, the challenge of finding that balance has become more and more difficult.

Our state's population is growing faster than ever before. Today, there are more than five million of us. But in just 50 years – less than a single lifetime – our numbers will double. How can we preserve our natural heritage under these circumstances?

First, we must be clear about what we value. Second, we must learn from our history, and from the best of the stewards who came before us. And third, we must constantly focus on keeping the balance between satisfying the needs of the present and the needs of the future.

When Washington became a state in 1889, the federal government gave our state ownership of aquatic lands – the riverbeds, shorelands, tidelands, and estuaries of our state.

Since then, our stewardship over aquatic lands has been fraught with conflict and controversy. In each generation, there have been divisions between those who argued for satisfying the needs of the present, and those who argued for preserving resources for the future. Finding the balance between the two has never been easy.

During Washington's constitutional convention, there was a huge conflict over who had rights to waterfront. In this century, there have been continuing conflicts over who could use aquatic lands, what uses would be allowed, and whether to sell off publicly-owned aquatic lands.

Today, we hope to resolve some of these historic conflicts, and to learn from the best stewards of previous generations. To do this, we need the help of people throughout our state – people who care about our rivers, our shorelands and tidelands, and our estuaries and wetlands.

We want to unite people from every walk of life and from every corner of our state around a vision of what we want to preserve for the future, and how we can satisfy the needs of today without jeopardizing what's really precious to us.

Rapid population growth challenges us to recognize that within just a few years, twice as many people will want to sit on a quiet riverbank, watch birds in a wildlife refuge, and live in homes on the waterfront. Similarly, there may be a doubling of demand for commercial, maritime, and industrial uses of our waterways and harbors.

The one thing that won't increase is the land itself.

That's why we've drafted the following vision statements and strategies. We want all our work to flow from our recognition that we are just one generation among many, and from a clear vision of what every generation ought to enjoy.

- **Every Washington citizen should know about the legacy of our public aquatic lands, and good stewardship of these resources should be a unifying value for all people of our state.** The preservation of our natural heritage depends on a vigilant and well-informed public. DNR and other natural resource agencies should work with public schools, community and religious organizations, and the media to expand public engagement in the stewardship of our natural heritage.

- **A growing population should be able to enjoy access to rivers, lakes and saltwater.** The people of every generation ought to be able to fish, to sit quietly beside a river, and to marvel at nesting eagles, flocks of migrating birds, and the rhythm of waves lapping on a beach. Public access to aquatic lands must be preserved and enhanced to provide these opportunities to a growing population.

- **Washington's water-dependent, non-polluting maritime economy should flourish.** Appropriately located waterfront enterprises should provide good jobs, non-polluting economic growth that benefits every corner of our state, and innovations that protect – and where necessary, restore – the biological integrity of our natural environment.

- **The biological health and diversity of our aquatic lands — including salmon and other species of fish, shellfish, birds, wildlife and native plants — should be rigorously protected.** Pristine shorelands, wetlands, and natural areas should be set aside to ensure that the basic building blocks of our natural heritage are preserved for all time. And even in those areas where humans and other species mingle, care should be taken to ensure harmony between us.

- **Wherever possible, what has been lost should be restored.** Over the past century or more, lapses in good stewardship have cost our state dearly. Public lands have been sold off, rivers have been polluted, industries have, in some cases, been inappropriately located. Wherever possible, the effects of these decisions should be mitigated or reversed to bring back the natural abundance and to restore public access.

- **Aquatic lands should be recognized and managed as part of whole ecosystems.** Past lapses of good stewardship have been caused, at least in part, by lack of understanding of the connections between different parts of our ecosystems. Now we must redouble our efforts to restore the "big picture" thinking that characterizes both the scientific analysis and the most ancient spiritual values of this state's first inhabitants.

The Aquatic Resources 10-Year Direction

The Aquatic Resources 10-Year Direction is a list of specific tasks and actions for the Aquatic Resources program – both Division and Region – to undertake to realize the Aquatic Vision and fulfill the department's responsibilities regarding state-owned aquatic lands. This list is the basis for setting the program's budget deliverables and other performance measures each biennium. Through the direction and deliverables, the department can measure whether the Aquatic Resources program is meeting its long-term goals.

The key direction for the Aquatic Resources program is to become a more aggressive trustee for aquatic resources to assure the healthy maintenance of the asset. As part of this direction, the department will:

- Educate the public to increase their appreciation of, and willingness to advocate for, the resources;

- Provide critical resource information for decision makers;

- Set standards for the use of aquatic lands that assure that the department meets statutory goals;

- Develop a plan to restore seriously degraded resources and protect sensitive and critical areas;

- Begin a program to acquire tidelands for public access and enjoyment; and
- Assure revenue is available to enhance the resource.

Stewardship Principles: Protecting and Restoring Environmental Resources

To properly manage state-owned aquatic lands and resources for the benefit of all the public, the department must take its stewardship role seriously. The decisions about whether to approve a proposed use, what lands to preserve for their environmental values, where to encourage public use and access, or how to clean up and restore polluted and degraded lands, must be made with attention to all the needs and resources of these lands to best provide for the benefits of aquatic lands.

In addition to reviewing lease applications, the department must participate in assessing environmental damage from the past and restoring essential ecosystem functions on aquatic lands. Site-by-site decisions about state-owned aquatic lands, including use authorizations, always must be made in the context of the larger ecosystem. To do otherwise will continue the trend of environmental loss and damage, and will fail to meet the department's obligations.

The following are a few principles of good stewardship. These principles originate from an awareness of the ecological connections between our actions and the health of the natural environment around us. They also apply, however, to decisions involving economic, social and political considerations. These are general principles, which should be applied when appropriate to specific decisions the department makes as steward of aquatic resources:

- **Apply an ecosystem management approach to decision-making.**
  Aquatic resources must be viewed as part of a larger complex system which includes upland and aquatic environments, plus human systems and impacts within those environments. This means that individual projects and requests must be reviewed in this ecosystem context, rather than as isolated cases.

- **Ecosystems require integrated and adaptive approaches to management.**
  Ecosystems are comprised of many related resources. Because there is often limited understanding of ecosystem functions, the department must be open to new knowledge about natural resources and their interactions. The department will work with lessees, project proponents, and other interested parties to integrate findings from new science, and to gather and integrate available ecological, technical, social and economic information.

- **Err on the side of the resources.**
  When activities might impact state-owned aquatic resources, or when information about impacts is incomplete, take the cautious approach. The burden of proof will be on the lessee and project proponent whose activities may potentially damage the resources to show that their actions are harmless or can be fully and appropriately mitigated.

- **Evaluate all ecological and social costs and benefits.**
  Aquatic lands provide essential habitat and irreplaceable biological and ecological functions. They also provide significant economic benefits, recreational opportunities and other social values. When considering costs and benefits of alternative decisions involving the use of aquatic resources, the department should include all such costs and benefits that can be determined.

- **Build partnerships.**
  Aquatic resources are affected by many forces and many decisions. Department staff must know about and be involved in local issues. The entire department must work with appropriate local, state and federal agencies, tribes, businesses, and community groups. Success depends on our ability and willingness to seek out others to help develop a complete picture and plans for aquatic lands.

- **Significant avoidable adverse impacts to natural resources will not be authorized.**
  If damage to aquatic lands or to the environment in general can reasonably be avoided, it must be. When in doubt about the potential environmental consequences of an action, choose caution or choose not to take the action until it is possible to erase the doubt.

- **Ensuring environmental protection requires both no net loss of habitat and, furthermore, a net gain of ecological functions and environmental values on state-owned aquatic lands.** Rather than merely preventing further degradation, every proposed new approval, renewal or change in an authorized use of state-owned aquatic lands should be considered an opportunity to enhance the aquatic environment. The department's intent is to issue use authorizations which do not degrade aquatic ecological functions, and that actually will enhance them. This way, in the long-term and in the broadest sense, the department will be able to ensure environmental protection on state-owned aquatic lands.

Chapter 2: Roles and Responsibilities for Decision-Making

Introduction

Making decisions on leases, easements, rights-of-way, rights-of-entry, and other types of use authorization is a key element of properly managing state-owned aquatic lands. These decisions are among the department's most powerful tools for ensuring good stewardship of these lands.

Through these decisions, the department may change the character of uses in an embayment, lake or river to achieve its statutory goals and responsibilities – or, if done poorly, to reduce the public benefits of these aquatic lands. By requiring change to a proposal or conditions in a lease or easement document, the department can fine-tune a use to make it fit more closely with these goals. Each decision on a proposed use has the potential to set a precedent across the state in the management of state-owned aquatic lands.

Therefore, it is important to think strategically and long-term, gather all the necessary information, consider all possible ramifications, exercise careful judgement for decisions on all use authorization applications, and fully document these decisions.

Serving the Public

The public the department serves includes all present and future citizens of Washington state. The department is responsible for managing state-owned aquatic lands for the benefit of the public as a whole, collectively, not one person at a time. In general, department staff should seek to work cooperatively with all project proponents, concerned citizens, government agencies, tribes and interested organizations alike to develop environmentally sound uses of state-owned aquatic lands, increase public access, support aquatic resource protection and enhancement projects, and cooperatively prepare shared plans and goals, consistent with the department's statutory obligations.

Each member of the public has the right to use state-owned aquatic lands, as long as they do not damage or alter the land or exclude others from using it. If a person wishes to occupy the land, extract resources from the land, alter the land in any way, have fully or partially exclusive use of state-owned aquatic lands, or interfere with the use of the land by the general public, they must apply for and be granted authorization from the department. That person then has the responsibility to protect the land, use it only in the approved manner, and compensate the public for that exclusive use.

As a public agency, the department has a unique land manager responsibility that carries to the public generally, as well as to individual members of the public. In that role, all department staff are expected to provide good customer service to every member of the public. Good customer service means reviewing an application promptly, responding to questions helpfully, making useful suggestions when possible, and giving a clear, timely, and defensible answer to an application. Good customer service does not necessarily require approving an application, but it does require making decisions in the best interest of the public as a whole. Good customer service includes providing answers to applicants in an honest as well as diplomatic and tactful manner.

Evaluation of a Proposal

In general, to evaluate a proposed use authorization, the following questions must be answered, based on the department's statutory responsibilities and goals:

What is the current condition of the state-owned aquatic lands in question?

It is essential to know the current baseline conditions of the aquatic lands in question, and of all neighboring or potentially affected aquatic lands. This includes habitat and natural conditions, uses currently occurring on the land or planned for the future, the specific laws and regulations which relate to that parcel of land, and any financial, legal, and environmental liabilities which currently exist or may exist. If the aquatic lands have been degraded from their original condition, it is valuable to identify their potential for restoration. Also, identify the values the state-owned aquatic lands provide, or could potentially provide, for public access, environmental protection, water-dependent use, renewable resource use, navigation and other benefits.

What are the department's short and long-term goals for these lands?

Before analyzing a proposal, review the department's goals for the proposed site and surrounding lands. These goals are established through statute and policy and in department plans for the parcel, bay or surrounding watershed. Staff should refer to specific aquatic land use plans whenever they exist. However, even in the absence of such plans, it is important to think carefully about the specific site, the unique or common characteristics of that site, and its relationship to the larger landscape.

This review should be conducted separate and apart from analyzing the proposal itself. The department's fundamental obligation is not merely to weigh the applicant's proposal, but to consider the best possible uses for the lands. Highest attention

should be paid to ensuring environmental protection, promoting public access, fostering water-dependent uses, and the other public benefits described in statute.

What is the nature of the proposal, in all respects?

To fully understand and have a complete picture of a proposal, and to circumvent last-minute "surprises" or glitches, try to answer the following questions:

- What is the value of the proposal to individuals or entities other than the general public? Who realizes that value and how?
- Does the proposed activity need to use or cross state-owned aquatic lands? If relocation or re-routing is feasible, would that improve the future management of state-owned lands? Would the project best be relocated upland?
- Is this a new proposal, an existing structure or use, or an expansion of a structure or use? If the project already exists, is it a trespass or has it previously been authorized? Would the department approve the project if it was newly proposed under current policies? Could it be modified or re-located now to conform to current conditions and policies? What is the realistic chance for removal of the facility?
- Has the applicant provided all necessary information for the department's evaluation of the project? How significant are remaining uncertainties in terms of environmental risk, financial risk or other concerns?
- What other governmental action is needed for this project, such as regulatory and land use permits? Does it need authorization from other landowners?
- How unique or precedent-setting is the proposed project? Does it raise unresolved policy issues? Is it politically controversial? Does it cross many jurisdictions?

- What comparable examples of this kind of proposal might be found elsewhere on state-owned aquatic lands, state-owned uplands, with other agencies, other states, or other landowners? What can the department learn from these examples?

How would the proposal affect aquatic lands?

For each proposal, the department should consider each of the public benefits of aquatic lands, individually as well as together. Significant questions include:

- Does the proposal encourage direct public use and access to state-owned aquatic lands, or discourage it?
- Does the proposal foster water-dependent uses, or inhibit them?
- Does the proposal ensure environmental protection, or does it endanger the environment? At a minimum, the department must specifically consider the land's natural values with regard to existing or potential wildlife habitat, existing or potential natural area preserves, the representativeness and relationship of this land within the ecosystem, and existing or potential spawning areas.
- Does the proposal utilize renewable resources, or reduce or prevent their utilization?
- Does the proposal generate revenue in a manner consistent with the other benefits, does it reduce revenue, or does it conflict with the other benefits?
- How, or in what manner, does the proposal provide the benefits outlined above?
- How much, or to what degree, does the proposal provide these benefits?

- How does the proposal affect navigation and commerce, especially in a harbor area?
- How might the value of the state-owned aquatic lands in question, as well as the surrounding lands, be damaged or enhanced by the project?
- How will the uses currently occurring on or near the land, or uses which are planned for the future, affect or be affected by the project?
- How will current or potential liabilities associated with the land be affected by the project?

Would the proposal advance or hinder the goals for these lands?

Once the effects of a proposal are known, staff must determine whether it appears to advance or hinder these public benefits and the department's goals and also whether it is the best potential use to do so. This is a key responsibility of department aquatic land managers.

Also, staff should not merely accept the proposal as offered, but creatively work to prepare the best possible proposal. Staff should ask how the proposal can be altered to best meet the department's goals.

In general, the duty of aquatic staff is to apply their best judgement to make an initial decision on how the proposal might advance or hinder the department's goals, and then offer a thoughtful recommendation to the final decision-maker. (To determine the final decision-maker, see the discussion on Delegation of Authority below.)

If the proposal is to be approved, what conditions or considerations should go into the final use authorization document?

Staff should seriously consider imposing conditions on the design, operation or other elements of the structure or activity within a use authorization to best meet the department's goals.

In fact, the department must impose whatever conditions are necessary to ensure environmental protection, provide for other public benefits of state-owned aquatic lands, and otherwise meet the department's statutory obligations.

It is particularly important to ensure that future options are maintained and future needs are considered. While other government agencies have a variety of regulatory requirements, no other agency has the same comprehensive proprietary mandates for environmental protection or public access on state-owned aquatic lands, so the department must take the lead on these issues. Also, under the Endangered Species Act, the department and the state can be liable for damage to habitat on state-owned aquatic lands. Staff may help to avoid serious or irrevokable environmental impacts or natural resource commitments.

Finally, before a use authorization is granted, the department should seek to meet all the following criteria:

- The data is sufficient to make an informed decision.
- All adverse environmental and other impacts, including cumulative impacts, have been considered and avoided, minimized or otherwise mitigated.
- Any restrictions to navigation and commerce have been considered and avoided, minimized, or otherwise mitigated.
- The project does not unreasonably restrict the department's future proprietary options.
- The project is consistent with any applicable department statutes, regulations, policies, and land use or "aquascape" plans.
- The project includes appropriate monitoring and adaptive management measures in case of unforeseen concerns.

- The project is consistent with applicable federal, state, or local plans.
- The project is consistent with all state, federal or local laws and permit requirements, and has received or will shortly receive all necessary permits.

Delegation of Authority

The Commissioner of Public Lands has delegated substantial authority for signing aquatic leases and other documents to various department managers. This authority is to be used within the limits of the statutes, regulations, and policies of the department. The delegation of authority does not negate any requirements to fully inform or involve Executive Management and/or the Aquatic Resources Division in advance about individual proposals or actions. (See discussion on the involvement of Executive Management in decision-making.)

The Commissioner of Public Lands has retained all signatory authority regarding:

- Aquatic Lands Enhancement Account grants
- Tide, shore and bedland leases, easements, and use and occupancy agreements over 12 years
- Utility rights-of-way
- Vacations of waterways
- Oil and gas leases
- Commissioner's orders (for example, designation of aquatic reserves)

The Commissioner has delegated to the Supervisor signatory authority regarding:

- Harbor Area leases
- Interagency agreements costing more than $10,000
- Land exchange agreements
- Mining contracts

The Commissioner and Supervisor have delegated to the Aquatic Resources Division Manager signatory authority regarding:

- Appraisals and sales of valuable materials, including geoducks, on aquatic lands
- Interagency agreements, not specific to a Region, costing $10,000 or less

The Commissioner and Supervisor have delegated to the Region Managers signatory authority within their Region regarding:

- Tide, shore and bedland leases, easements, and use and occupancy agreements for 12 or fewer years
- Waterway permits
- Lease assignments, including consents to assignments for security or other purposes
- Interagency agreements specific to a Region costing $10,000 or less

Authority for signing aquatic leases for12 or fewer years and waterway permits has been delegated to both the Aquatic Resources Division Manager and the Region Managers. Unless otherwise directed by Executive Management, however, these should be prepared by the Regions and signed by the appropriate Region Manager.

For signatory authority granted to the Division Manager and Region Managers, the Commissioner and the Supervisor reserve the right to sign documents at their discretion. Also, Executive Management reserves the authority to review all proposals and draft documents at its discretion. (See discussion on what and when to send for Executive Management review.)

When the signature authority is with the Commissioner or Supervisor, final documents generated by a Region are to be forwarded by the Region Manager directly to the appropriate authority, without need for formal review or signature of the Division Manager or intervening layers of management. Final documents generated by the Division are to be forwarded by the

Division Manager in a like manner. Because Region staff will prepare most use authorizations, Division staff will have a less active role in individual leases. Region and Division staff can and should continue to cooperate as needed. Division staff will have responsibility for preparing general policy and guidance on leasing, but Regions will have authority and responsibility for deciding on individual leases or making recommendations on individual leases directly to Executive Management.

For amendments to a lease, the signatory authority is the same person who signed the original lease. If the original lease was for more than 12 years or if for some other reason it was signed by the Commissioner, then amendments to the lease must go to the Commissioner for signature.

If a lease includes a renewal option so that the lease, including any renewals, would extend more than 12 years in total, then the lease should go to the Commissioner for signature. The purpose of this is not to eliminate the use of renewal options, nor to require that all leases fully end and be re-written every twelve years, but rather to prevent the department from being inadvertently locked into a long-term contract due to repeated renewals with no ability to resolve future problems.

Region staff may arrange for and collect information on an appraisal or sale of valuable materials from aquatic lands, but the Division Manager must give final approval to the appraisal or sale.

The Role of Executive Management

In general, the responsibilities of Executive Management regarding use authorizations are to:

- Set or give guidance on the standards for making decisions
- Provide land managers with the tools they need
- Review a land manager's recommendation
- Make a final decision

- Communicate the final decision to the land manager

Set or give guidance on the standards for making decisions

The standards for making decisions on use authorizations are based on the state Constitution, applicable statutes and rules, and the department's 10-year direction and vision for aquatic resources. These standards are set by the Legislature, the Board of Natural Resources or Executive Management, as appropriate, and are explained and discussed throughout this manual.

If any staff disagree with this manual on factual or policy grounds, or have a suggestion for improvement, they should describe the issue in writing to the Division. Until a change is approved by Executive Management, however, the guidance in this manual applies.

Provide land managers with the tools they need

Executive Management is responsible for making available the tools staff need to investigate and analyze use authorization applications. These tools include guidance and direction such as this manual, leadership on major issues, final budget determinations, direction to develop information sources, development of environmental compliance and business support divisions to provide various services, and the setting of general and specific priorities. Such tools will inevitably be limited by budget and other constraints, but the department must constantly strive to improve them. It is the staff's responsibility to use these tools well, and to make recommendations on how to improve them.

Review a land manager's recommendation

When a recommendation is prepared by a land manager and Region Manager, it will go to Executive Management for review. The review process has been simplified, in that the recommendation is forwarded directly to the final signatory authority without review by the Division or intervening levels of Executive Management. This should ease the process, but also increases the responsibility of the land manager and Region Manager for the quality of the recommendation delivered.

The final decision-maker will be interested not only in what the initial decision is, but also why it was made. The staff report and recommendation should provide enough information that the decision-maker can make the best informed decision. This communication with Executive Management is described in more detail below.

Make a final decision

The final decision-maker may be the Commissioner of Public Lands, the Supervisor or the Region Manager, as described in Delegation of Authority above.

The signatory authority will make the final decision based on the same standards as described for the initial decision. If all considerations have been properly addressed, the initial decision and final decision should commonly be the same. On occasion, however, a final decision may differ from the initial decision for a variety of reasons. A land manager's success should be judged by the quality of the recommendation in analyzing the proposal and promoting the public benefits of state-owned aquatic lands as outlined in this manual, and not solely on whether the recommendation is ultimately followed.

All proposals must receive final approval from the appropriate signatory authority before a formal or informal offer is presented to the proponent. When staff discuss leases with applicants, they should make it clear that the decision by the department is not final until the final decision-maker has approved it.

All lease documents must be signed by the department before they are presented to the applicant for signature. If extensive negotiation with the proponent will be needed, a counter-proposal or general negotiating position of the department must be approved by the final signatory authority before an offer is presented to the applicant for consideration. This may require presenting the recommended counter-proposal or negotiating position for preliminary approval from Executive Management before conducting negotiations toward a final agreement.

Communicate the final decision to the land manager

Once a final decision has been made, Executive Management is responsible for clearly and promptly communicating that decision, with a brief explanation, to the land manager who will in turn document it and communicate it to the applicant.

If Executive Management decides to not follow staff recommendations, then the reason for this should also be carefully explained for purposes of future applicant appeals and for better informing land managers on future recommendations.

Communicating with Executive Management and the Division

Region staff, through Region management, will need to inform Executive Management about a proposed use authorization at the time that an initial decision is recommended to them. Often, however, Executive Management should be informed much earlier than this, and may need to be informed about leases even when the Region Manager is the final signatory authority.

The following situations should be brought to the attention of Executive Management and also to the Division so it may consider appropriate new policies and guidance:

- When there is no applicable statute, policy, or guidance on the issue.
- When the proposed use or site conditions would set a precedent, such as when the use has never before been done on state-owned aquatic lands or when a new commercial use has no precedent for valuation.
- When the request is for a pilot or demonstration project.

In addition, proposals should be raised early to the attention of Executive Management when:

- The proposal involves current or likely litigation.
- The proposal would cause high environmental risk.
- The proposed use is associated with a high risk outfall .
- The proposal would have high cultural or historic sensitivity; for example, a site which is listed on the state or national historic register.
- The proposal would raise concerns among affected tribes.
- There is, or there is potential for, significant conflict with other agencies or local governments.
- There has been, or there is potential for, significant public controversy.
- There is executive or legislative involvement from other jurisdictions.

Given such information, Executive Management may wish to be directly involved in the negotiations or evaluation of a particular proposal, or may assign Division staff to do so.

What to include for executive management review

The final decision-maker and signatory authority will want to ensure that this is the most prudent decision that could be made to provide for the best interests of the public. Staff should ask themselves what they would want to know in order to assure that a prudent decision is made, considering the many complexities and alternatives that may exist.

In general, the recommendation for an initial decision or the early notification that is provided to Executive Management should include the following types of information:

- The condition of the state-owned aquatic lands in question, and of neighboring or otherwise affected lands.
- The name of the proponent, and any pertinent information about who they are.
- The nature of the project, use, structure or activity to be undertaken on state-owned aquatic lands.
- The value or advantages that the state-owned aquatic lands may provide to the proponent, project, use, structure or activity.
- The relationship of the proposal to the department's statutory responsibilities and policy goals, including to the desired provision of public benefits. This should specifically refer to the relevant statutes, rules, and policies.
- The relationship of the proposal to other existing or potential future uses of state-owned aquatic lands.
- Significant natural resource or ecological impacts, including cumulative impacts from this and related existing or future proposals, and considering the impacts from growth and development that may be triggered by the proposal.
- Steps taken to mitigate adverse environmental impacts.
- The nature and status of any public issues or controversy, involvement by public officials, or related litigation.
- Steps taken to address financial and environmental risks.
- Any unresolved legal and/or policy questions.

- The amount and basis of the recommended valuation and rent, if the proposal is recommended for approval. This should especially include any precedents in the department's recent practice and any comparables from other jurisdictions or other landowners.
- Alternatives that have been considered, the pros and cons of each, and the rationale for choosing the recommended decision rather than the other alternatives.
- The fundamental rationale for why the initial decision may be in the best interests of the public.

Information given to Executive Management should discuss the issues and assumptions behind the conclusions, not merely the conclusions themselves. In general, staff must provide sufficient explanation so that the final decision-maker can evaluate, not merely read, the proposed alternatives and recommendation.

The Role of the Division

In general, the responsibilities of the Aquatic Resources Division regarding use authorizations are to:

- Provide policy guidance and direction
- Provide oversight and audit the overall success of the program
- Coordinate and conduct negotiations on selected major projects
- Review authorizations with unresolved policy questions or which would set precedents

Provide policy guidance and direction

The Division is the primary source for policy guidance and direction on use authorizations and other land management activities. For example, this manual is to be maintained and updated continuously by the Division. Division policy staff will be responsible for identifying new issues and policy concerns,

gathering ideas to address these issues and concerns, and preparing proposals for Executive Management. All staff should direct ideas and suggestions for policies to Division policy staff. Executive Management remains the final decision-maker regarding policies and direction. The Division is also responsible for communicating approved policies and direction to land managers and other staff.

The Division has responsibility for updating model contracts and other use authorization templates as needed to better achieve department goals. Region staff should continue to use current templates in the best possible manner, and not delay applications while waiting for future template updates. Region staff should also forward suggestions on templates to the Division.

Not every question from a land manager regarding use authorizations should be directed to the Division. Land managers should initially direct questions to their own supervisors. If a question cannot be answered through a review of relevant statutes, regulations, this manual, and other guidance materials, or by reasonable application of the principles therein, then it can be directed to the Division. Region and Division Managers should develop a preferred means of communicating these questions and answers.

Provide oversight and audit the overall success of the program

The Division will develop a reporting system to routinely identify emerging trends and issues in aquatic land management. Division staff can then prepare policy and guidance on these issues, as appropriate. Also, the Division will develop auditing and monitoring systems to catch problems within the program. For example, if a backlog of lease applications is growing, the Division should work to identify why and determine what must be done to eliminate it. Finally, the auditing should assure that department policies and direction are understood and are being followed by all staff.

The Division's auditing and monitoring functions are intended to address the success of the program as a whole in meeting the department's statutory obligations, not the success of specific individuals nor of contract processing activities. Audit functions regarding personnel or business issues may be provided by other Divisions, as appropriate.

Coordinate and conduct negotiations on selected major projects

The Division may coordinate projects which involve a lot of staff and many related decisions, such as the collaborative Commencement Bay efforts, Bellingham Bay planning efforts, or multi-region linear projects. Region staff will continue to be involved in most of these projects, but a Division staff person may be assigned as project manager. Regions will conduct most rent negotiations, with training and valuation information from the Division. The Division may be assigned to negotiate rents and related agreements for some complicated and high value leases, such as for the Edgewater Hotel and Cherry Point leases.

The precise division of responsibilities for specific projects will be determined on a case-by-case basis by Division and Region Managers, with direction from Executive Management. Region land managers are presumed to be responsible for all leases and other direct land management activities until an explicit decision is made to assign responsibility elsewhere.

Review authorizations with unresolved policy questions or which would set precedents

The Division should be more involved in use authorization applications when the decision on the application requires a larger policy decision or would set a precedent that amounts to a new policy decision. When no specific policy or direction exists to guide a decision on a proposed use, and staff cannot reach a clear decision by applying the general principles of aquatic land management as described in law and policy, then the Division should, relatively quickly, develop and provide interim guidance.

In general, the interim guidance should be cautious, keep options open, and err on the side of protecting the resources. It should avoid long-term commitments and irrevokable impacts. All use authorizations involving interim guidance must go to the Commissioner for final signature. The recommendation to the Commissioner should include a discussion of the interim guidance and of the precedent-setting nature of a proposal.

While the Division determines the interim guidance to apply to a proposed use, the Region staff and Region Manager remain responsible for the recommendation on the use itself.

The Role of the Region Manager

Region Managers have significant authority and responsibility for use authorization decisions. For use authorizations with a term of 12 or fewer years and for waterway permits, the Region Manager is the final signatory authority. For all other use authorizations and for other aquatic land management decisions, the Region Manager will review and forward proposals to the Commissioner or Supervisor for final approval. (See the discussion on Delegation of Authority above.)

Final lease documents generated by a Region are either to be signed by the Region Manager or forwarded by the Region Manager directly to the appropriate signatory authority, without need for formal review or signature of the Division Manager or intervening layers of management. Division staff should be directly involved only if there are policy questions that need resolution or if the authorization would set a precedent.

Region Managers, therefore, will bear some of the responsibilities of both land managers and Executive Management. For leases forwarded to Executive Management for signature, Region Managers, like land managers, should be knowledgeable enough to explain the reasons for, and be willing to advocate for, the recommendation. For leases that may be signed by Region Managers, the Region Managers must review

recommendations from the land managers and must take responsibility for ensuring that the final decision best meets the department's statutory obligations and goals.

Region Managers will also need to arrange with the Division Manager on how best to communicate Region needs and questions to the Division, and how to divide responsibility for major projects in which Division staff may be directly involved.

The Role of the Land Manager

In this section, the term "land manager" is used broadly to mean all staff who participate in management of state-owned aquatic lands and who may receive, analyze, and recommend for or against proposed use authorizations. Most often, this will be Region aquatic staff, both line staff and supervisors, but this section applies equally to any department staff who may be in this position.

The general responsibilities of the land manager regarding use authorizations are to:

- Know the standards for making decisions.
- Know the aquatic lands affected.
- Investigate and analyze proposed uses.
- Inform Executive Management or the Division, as needed.
- Work with the Aquatic Resources Division, Environmental Quality and Compliance Division, Engineering Division, and Business System Support Division contract and scientific support groups, as appropriate.
- Work with other agencies, as appropriate.
- Make suggestions for improving proposals.

- Make the initial decision on a proposal.
- Recommend and defend decisions to the final decision-maker.
- Document the final decision and communicate it to the applicant and any other appropriate parties.

Know the standards for making decisions

The standards for making decisions on use authorizations, as described in this manual, are based on the state Constitution, applicable statutes and rules, policies passed by the Board of Natural Resources, and the department's 10-year direction and vision for aquatic resources. In particular, the department is responsible for ensuring environmental protection and providing for the other public benefits described in RCW 79.90.455 and other statutes.

Land managers are expected to thoroughly understand these statutes and rules and this manual. When questions arise, land managers should contact their supervisors. If a policy or interpretation question cannot be resolved, questions should be directed to the Division in a manner determined by the Region and Division Managers.

If any staff disagree with this manual on factual or policy grounds, or have suggestions for improvement, they should describe the issue in written detail to the Division. Until a change is approved by Executive Management, however, the guidance in this manual applies.

Know the aquatic lands affected

In addition to knowing the standards for use authorizations, land managers should know the conditions of the state-owned aquatic lands in question, to the best of their ability and with all available information. Land managers should be aware of the conditions of surrounding aquatic lands and adjacent uplands.

The Division will work to provide better information on the condition of aquatic lands throughout the state, but land managers will likely need to seek additional information on specific sites separately. In particular, a site visit may provide highly valuable information that cannot be gained any other way.

Investigate and analyze proposed uses

When a proposal for use of aquatic lands is received, the land manager must actively investigate and analyze the proposed use. It is not sufficient to rely on the applicant's characterization.

Staff should not hesitate to require additional information from the applicant. Any expense required for collecting this information beyond the routine staff time necessary to review the application is the responsibility of the applicant. At the same time, the land manager is responsible for judging the completeness and accuracy of the information. If information necessary to make a decision is not available, or if the applicant is unwilling to bear the expense of collecting necessary information, staff should notify the applicant that consideration of the proposal has been postponed until the information is available.

If at all possible, conduct a site visit. A site visit will usually give a far better understanding of the issues facing both the applicant and the department. If the site visit requires staff to cross private property not open to the public, they must obtain the permission of the property owner.

After gathering the information, the land manager is responsible for completing a thorough analysis of the proposal. This analysis may draw heavily on the analysis and description required of the applicant, but should not depend solely upon it.

Inform executive management or division, as needed

The earlier section on communication with Executive Management describes when and how staff are expected to inform Executive Management regarding applications for use authorizations. Processes for informing immediate supervisors and Region Managers are to be determined within each Region.

Work with other agencies, as appropriate

Many other governmental entities have some involvement in nearly all of the projects proposed or existing on state-owned aquatic lands. These agencies have important roles to play; the department will coordinate with federal, state and local environmental regulatory agencies with regard to their requirements. Staff should also coordinate with other agencies as appropriate for salmon habitat restoration, watershed planning, and similar environmental protection efforts.

None of these agencies, however, is responsible for comprehensive management of state-owned aquatic lands or for protecting the proprietary interests of the public as owners of these lands. In some cases, consideration of proprietary interests may lead to a different conclusion about the project than does a purely regulatory or service-delivery perspective. Department staff must be diligent in carrying out the department's unique responsibilities for these public lands and resources.

Make suggestions for improving proposals

The department must not be limited to the proposal made by an applicant for use of state-owned aquatic lands. Instead, staff should seek ways to improve proposals and achieve the use of state-owned aquatic lands that provides for the best interests of the public. Failure to consider alternative proposals and uses will weigh heavily against approval of an application.

Staff should be involved with proposals at the earliest possible time, even before a formal use authorization application is received. When possible, this includes participating in land use planning and the preliminary design of projects.

Staff should notify applicants of what uses are likely not to be authorized, and which alterations of a proposal would make it most likely to be approved, bearing in mind that land managers cannot make the final decisions. Staff should forward the best possible alternative to the final decision-maker, not merely whatever project the applicant proposes. This includes, when circumstances dictate, recommending an entirely different use as a preferred alternative to the applicant's proposed use. In these cases, staff should indicate how the alternative would provide for better management of state-owned aquatic lands.

Make the initial decision on a proposal

After investigating, analyzing, and considering alternatives to a proposal for use of state-owned aquatic lands, the land manager must make an initial decision on whether it appears to advance or hinder the department's goals, and make a recommendation on whether to approve or deny it. This recommendation will then go to the Region Manager, Supervisor or Commissioner as appropriate to make the final decision.

This initial decision is a distillation of all the analysis and considerations described throughout this manual. It is the most important part of a land manager's job. It is also the occasion when staff are to apply their best professional judgement and have their best opportunity to provide for good stewardship of the lands under the department's care.

It is not the responsibility of the land manager to find a way to approve (or even improve) all applications. It is the responsibility of the land manager to make an informed, thoughtful recommendation for or against approval of each application based on whether the proposal advances or hinders the department's statutory goals and aquatic vision. Success for the department does not require approving all proposals. Instead, the department will be successful if staff recommend in favor of proposals which most benefit the public, and against proposals which do not.

If the recommendation is to approve an application, staff may include conditions which must be met for the use to be authorized. For example, staff should consider what would be the ideal outcome for the public and what outcomes should absolutely not be accepted, and design the conditions accordingly.

In fact, staff must include whatever conditions are necessary to best provide for the public benefits of state-owned aquatic lands. While any given single lease may not realistically provide for every kind of public benefit, staff should search for ways within each lease to ensure environmental protection, encourage direct public use and access, foster water-dependent uses, utilize renewable resources, generate revenue in a manner consistent with these other public benefits, and provide for navigation and commerce. To meet the department's statutory responsibilities regarding state-owned aquatic lands, staff should require applicants to take all feasible steps to provide for these benefits.

Recommend and defend decisions to the final decision-maker

After the analysis is complete and the land manager has made a recommendation to either approve or deny the use authorization application, the land manager must write a brief staff report that clearly explains the reasons for the recommendation and cites the factors considered in making it. If the recommendation is to approve the proposed use, the report should also list and fully explain each of the conditions that will be placed on the contract. The recommendation should then be forwarded to the Region Manager. If appropriate, the Region Manager may forward it to the Supervisor or Commissioner (as described in Delegation of Authority above).

If the lease is especially complicated or controversial, or if extensive negotiation with the applicant will be needed, it may be appropriate to send a preliminary recommendation to the Region Manager, Supervisor or Commissioner before staff prepares a final lease document. This can be sent by the same procedure as for final recommendations. Staff should describe

the issues that must be resolved in order to properly negotiate or prepare the lease document, and recommend how to resolve them. Otherwise, if the lease is relatively uncomplicated, then a copy of the proposed lease can accompany the initial recommendation.

All lease documents must be signed by the department before they are presented to the applicant for signature. Likewise, in instances of extensive negotiation, a counter-proposal or general negotiating position of the department must be approved by the final signatory authority before a formal offer is presented to the applicant for consideration.

The land manager should be able to explain the reasons for, and also be willing to advocate for, the recommendation presented to the final decision-maker. If staff are uncomfortable making the recommendation or arguing on its behalf, then it may need to be reconsidered.

Document the final decision and communicate it to the applicant

Once an application is approved or denied, the department must document the final decision and the reasons why it was made, with reference to the department's statutes, regulations and policies. The record that the department makes concerning the underlying reason for its final decision is extremely important. It may be used in a future legal proceeding, including if the applicant appeals the decision. Future lease managers may need this documentation in order to understand the lease history. Ideally, this explanation should be consolidated into one concise document that can be easily read. This document must be made at the time the decision is made. This applies equally to final decisions made by Region Managers and Executive Management.

Finally, the land manager must communicate the decision on the proposal to the applicant. If approved and signed, the use authorization should now be ready for the applicant's signature. (Note that the department authority must sign the document

before it is offered to the applicant for signature.) If a preliminary recommendation was approved, staff can now negotiate or prepare the final lease document. If disapproved, the applicant should receive a brief explanation as to the reasons why, with reference to the department's statutes, regulations, and policies and the specifics of the application.

Chapter 3: Laws and Topics

Introduction

This section of the Aquatic Resources Policy Implementation Manual discusses numerous topics and issues regularly facing department staff. The discussion of each topic begins with the text of the constitutional provisions, statutes (RCWs), and rules (WACs) that apply to that topic. All the statutes and rules commonly used in aquatic land management are included, mostly from Chapters 79.90 through 79.96 RCW and Chapter 332-30 WAC.

The best guidance on these topics is usually the text of the statutes and rules themselves. Most of them are written clearly and plainly. The discussion on each topic includes further interpretation when needed. Whenever in doubt, staff should always view statutes and rules in light of the overall management principles and goals established by the Legislature, especially as discussed in RCW 79.90.450 and RCW 79.90.455. (See the section on Public Benefits for the text of these statutes.)

Each topic also includes discussion of key issues to be aware of, examples and ideas for addressing these issues, the relationship of one topic to others, and further guidance and direction on how to apply the statutes and rules to day-to-day aquatic land management decisions.

This manual does not – and cannot – discuss every issue on every topic. When a new issue or problem arises, staff should

apply the principles found in the statutes and rules and this manual to the new situation. Staff should also consult with their supervisors and the Division when a new situation would appear to require new policy.

Even more than the rest of the manual, this section is intended to be a "work in progress." It is designed to allow easy changes and updates, and to accommodate new guidance on emerging issues. The Division is responsible for regularly updating the topics in this manual, with final approval from Executive Management. When staff have suggestions for adding to or improving the manual, they should forward them to the appropriate Division staff.

A

Accretion and erosion

WAC 332-30-106 Definitions.
All definitions in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114). For the purpose of this chapter:
(1) "Accretion" means the natural buildup of shoreline through the gradual deposit of alluvium. The general principle of common law applicable is that a riparian or littoral owner gains by accretion and reliction, and loses by erosion. Boundary lines generally will change with accretion.
(8) "Avulsion" means a sudden and perceptible change in the shoreline of a body of water. Generally no change in boundary lines occurs.
(17) "Erosion" means the gradual cutting away of a shore by natural processes. Title is generally lost by erosion, just as it is gained by accretion.
(58) "Reliction" means the gradual withdrawal of water from a shoreline leaving the land uncovered. Boundaries usually change with reliction.

Discussion on accretion and erosion

Questions of accretion, avulsion, erosion, and reliction are important because they determine ownership when shoreline locations change. In general, when shorelines change gradually, such as by accretion or erosion, the ownership boundary changes with it. However, when shorelines change suddenly in avulsions – such as land slides and dredging – ownership boundaries do not change. In the latter case, aquatic lands may be dry but still legally be considered aquatic lands, and uplands may be wet but still legally be considered uplands. When ownership disputes arise, staff

should consult with the Division or the department's Land Surveyor for aquatic lands.

An exception to the above rules is when accretions add to tidelands or shorelands which the state previously sold, as described above. This may happen if sediment washed onto the tidelands or shorelands making the extreme low tide line or line of navigability farther from shore. In this case, the new tidelands or shorelands belong to the state, but the owner of adjacent tidelands or shorelands has a preference right to purchase them. SEE ALSO: Tidelands; Shorelands. For more information on sale of accreted tidelands or shorelands, SEE ALSO: State-owned aquatic lands.

Acquisitions

SEE: Exchanges and acquisitions.

ALEA grants

SEE: Aquatic Lands Enhancement Account.

Appeals, rent

SEE: Rent.

Aquaculture

RCW 79.68.080: Fostering use of aquatic environment--Limitation.
The department of natural resources shall foster the commercial and recreational use of the aquatic environment for production of food, fibre, income, and public enjoyment from state-owned aquatic lands under its jurisdiction and from associated waters, and to this end the department may develop and improve production and

harvesting of seaweeds and sealife attached to or growing on aquatic land or contained in aquaculture containers, but nothing in this section shall alter the responsibility of other state agencies for their normal management of fish, shellfish, game and water.

RCW 79.90.495: Rents and fees for aquatic lands used for aquaculture production and harvesting.

If state-owned aquatic lands are used for aquaculture production or harvesting, rents and fees shall be established through competitive bidding or negotiation.

WAC 332-30-106 Definitions.

(4) "Aquaculture" means the culture and/or farming of food fish, shellfish, and other aquatic plants and animals in fresh water, brackish water or salt water areas. Aquaculture practices may include but are not limited to hatching, seeding or planting, cultivating, feeding, raising, harvesting of planted crops or of natural crops so as to maintain an optimum yield, and processing of aquatic plants or animals.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(8) Whenever structures are used for aquaculture on the beds of navigable waters, they shall be located in such a way as to minimize the interference with navigation and fishing and strive to reduce adverse visual impacts.

WAC 332-30-161: Aquaculture.

This section shall not apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114). Aquaculture is an aquatic land use of state-wide value. Aquaculture will be fostered through research, flexible lease fees, and assistance in permitting and planning.

(1) Research. The department will conduct or sponsor research and development work on aquaculture species and techniques suitable for culture on state-owned aquatic lands. Research will be coordinated with, and not duplicate, research undertaken by other agencies.

(2) Fees. Lease fees for aquaculture operations are subject to negotiation. Negotiations will consider the operational risks, maturity of the industry, and ability to further research.

(a) Fees may be reduced during the initial start-up period of the lease.

(b) Fees over the life of the lease will not exceed rents paid by other water-dependent uses.

(3) Permit acquisition. The department may obtain local, state, and/or federal permits for aquacultural use of state-owned aquatic lands having high aquaculture potential and lease these areas to aquaculturists.

(4) Site protection. The department will identify areas of state-owned aquatic land of state-wide value for aquaculture. Local governments will be encouraged to reserve and protect these lands from incompatible uses.

Discussion on aquaculture

Aquaculture includes harvesting of existing shellfish, cultivating shellfish in artificial beds, cultivating shellfish on floating rafts, and raising fin fish in floating net pens. It does not include harvesting geoducks. SEE ALSO: Geoducks.

Even though aquaculture is a water-dependent use, rents and fees for aquaculture production and harvesting are set through competitive bidding and negotiation, not by the water-dependent rent formula. However, fees over the life of the lease may not exceed rents that would be paid by other water-dependent uses. SEE ALSO: Water-dependent uses.

Aquaculture has been specifically designated as an aquatic land use of state-wide value. Therefore, the department generally encourages this use, and it takes precedence over other water-dependent uses which have only local interest values. SEE ALSO: State-wide value.

Before leasing a site for aquaculture, the department or the applicant should check for health-related closure areas. Closures may be the result of pollution or of illness-causing bacteria. Shellfish areas must be approved by the Department of Health's Shellfish Monitoring Program.

The environmental impacts of surrounding activities can have adverse effects on aquaculture. In particular, increasing

sewage disposal and non-point pollution, both associated with population growth, can render areas unfit for harvesting shellfish or growing fin fish. The department must take careful consideration of this when considering applications for uses near aquaculture sites, and applicants should be aware of environmental impacts which are beyond the department's control. SEE ALSO: Environmental protection.

Upland residential development can also present a problem for aquaculture. In addition to pollution issues, bulkheads constructed by residents potentially alter the marine environment. Also, some residents have concerns about noise and aesthetic issues. Aquaculture operations should seek to address such concerns, and the lease should detail how this will be done. However, aquaculture remains a favored use of state-owned aquatic lands.

Cultivation of artificial shellfish beds can have unexpected adverse environmental impacts. In preparing beds, operators have been known to uproot and destroy existing aquatic vegetation and other habitat. Also, in the past, chemicals have been used to kill unwanted species. To prevent such damage, a lease should include a plan of operations which indicates how artificial beds will be prepared without such impacts, and staff should have the opportunity to review implementation of the plans.

AQUACULTURE: LEASES

SEE: Use authorizations.

AQUACULTURE: NET PENS AND FLOATING RAFTS

Discussion on aquaculture: net pens and floating rafts

Environmental concerns related to net pens (for fin fish) and floating rafts (for shellfish) include accumulation of organic wastes below the pens, and the introduction of exotic species or diseases into the environment. With an application for leasing net pens or floating rafts, the department should require a plan of operations and other information to ensure both environmental protection and adequate technical and business expertise on the part of the operator. SEE ALSO: Use authorizations.

The department recently conducted a study, titled "Potential Offshore Fin Fish Aquaculture in the State of Washington," March 1999, to identify potential suitable sites for net pens. These are primarily along the Strait of Juan de Fuca. Contact the Division for information on this study.

Some jurisdictions, notably Kitsap County, may limit net pens and floating aquaculture. In such cases, unless the project proponent receives variance or conditional use authorization from the local government, the department will not issue a lease. To avoid this type of conflict, the department should work closely with local governments on their shoreline master programs to ensure they do not prohibit uses allowed under the Shoreline Management Act.

AQUACULTURE: SHELLFISH CULTIVATION

RCW 79.96.010: Leasing beds of tidal waters for shellfish cultivation or other aquaculture use.

The beds of all navigable tidal waters in the state lying below extreme low tide, except as prohibited by section 1, Article XV, of the Washington state Constitution shall be subject to lease for the purposes of planting and cultivating oyster beds, or for the purpose of cultivating clams or other edible shellfish, or for other aquaculture use, for periods not to exceed thirty years. Nothing in this section

shall prevent any person from leasing more than one parcel, as offered by the department.

RCW 79.96.020: Leasing lands for shellfish cultivation or other aquaculture use--Who may lease--Application--Deposit.

Any person desiring to lease tidelands or beds of navigable waters for the purpose of planting and cultivating oyster beds, or for the purpose of cultivating clams and other edible shellfish, shall file with the department of natural resources, on a proper form, an application in writing signed by the applicant and accompanied by a map of the lands desired to be leased, describing the lands by metes and bounds tied to at least two United States government corners, and by such reference to local geography as shall suffice to convey a knowledge of the location of the lands with reasonable accuracy to persons acquainted with the vicinity, and accompanied by a deposit of ten dollars which deposit shall be returned to the applicant in case a lease is not granted.

RCW 79.96.030: Leasing lands for shellfish cultivation or other aquaculture use--Inspection and report by director of fish and wildlife--Rental and term--Commercial harvest of subtidal hardshell clams by hydraulic escalating.

(1) The department of natural resources, upon the receipt of an application for a lease for the purpose of planting and cultivating oyster beds or for the purpose of cultivating clams or other edible shellfish, shall notify the director of fish and wildlife of the filing of the application describing the tidelands or beds of navigable waters applied for. The director of fish and wildlife shall cause an inspection of the lands applied for to be made and shall make a full report to the department of natural resources of his or her findings as to whether it is necessary, in order to protect existing natural oyster beds, and to secure adequate seeding thereof, to retain the lands described in the application for lease or any part thereof, and in the event the director deems it advisable to retain the lands or any part thereof for the protection of existing natural oyster beds or to guarantee the continuance of an adequate seed stock for existing natural oyster beds, the same shall not be subject to lease. However, if the director determines that the lands applied for or any part thereof may be leased, the director shall so notify the

department of natural resources and the director shall cause an examination of the lands to be made to determine the presence, if any, of natural oysters, clams, or other edible shellfish on said lands, and to fix the rental value of the lands for use for oyster, clam, or other edible shellfish cultivation. In his or her report to the department, the director shall recommend a minimum rental for said lands and an estimation of the value of the oysters, clams, or other edible shellfish, if any, then present on the lands applied for. The lands approved by the director for lease may then be leased to the applicant for a period of not less than five years nor more than ten years at a rental not less than the minimum rental recommended by the director of fish and wildlife. In addition, before entering upon possession of the land, the applicant shall pay the value of the oysters, clams, or other edible shellfish, if any, then present on the land as determined by the director, plus the expense incurred by the director in investigating the quantity of oysters, clams, or other edible shellfish, present on the land applied for.

(2) When issuing new leases or reissuing existing leases the department shall not permit the commercial harvest of subtidal hardshell clams by means of hydraulic escalating when the upland within five hundred feet of any lease tract is zoned for residential development.

RCW 79.96.050: Leasing lands for shellfish cultivation or other aquaculture use--Renewal lease.

The department of natural resources may, upon the filing of an application for a renewal lease, cause the tidelands or beds of navigable waters to be inspected, and if he or she deems it in the best interests of the state to re-lease said lands, he or she shall issue to the applicant a renewal lease for such further period not exceeding thirty years and under such terms and conditions as may be determined by the department: PROVIDED, That in the case of an application for a renewal lease it shall not be necessary for the lands to be inspected and reported upon by the director of fish and wildlife.

RCW 79.96.060: Leasing lands for shellfish cultivation or other aquaculture use--Reversion for use other than cultivation of shellfish.

All leases of tidelands and beds of navigable waters for the purpose of planting and cultivating oysters, clams, or other edible shellfish

shall expressly provide that if at any time after the granting of said lease, the lands described therein shall cease to be used for the purpose of oyster beds, clam beds, or other edible shellfish beds, they shall thereupon revert to and become the property of the state and that the same are leased only for the purpose of cultivating oysters, clams, or other edible shellfish thereon, and that the state reserves the right to enter upon and take possession of said lands if at any time the same are used for any other purpose than the cultivation of oysters, clams, or other edible shellfish.

RCW 79.96.070: Leasing lands for shellfish cultivation or other aquaculture use--Abandonment--Application for other lands.

If from any cause any lands leased for the purpose of planting and cultivating oysters, clams, or other edible shellfish shall become unfit and valueless for any such purposes, the lessee or his assigns, upon certifying such fact under oath to the department of natural resources, together with the fact that he has abandoned such land, shall be entitled to make application for other lands for such purposes.

RCW 79.96.090: Lease of tidelands set aside as oyster reserves.

The department of natural resources is hereby authorized to lease first or second class tidelands which have heretofore or which may hereafter be set aside as state oyster reserves in the same manner as provided elsewhere in this chapter for the lease of those lands.

RCW 79.96.100: Inspection and report by director of fish and wildlife.

The department of natural resources, upon the receipt of an application for the lease of any first or second class tidelands owned by the state which have heretofore or which may hereafter be set aside as state oyster reserves, shall notify the director of fish and wildlife of the filing of the application describing the lands applied for. It shall be the duty of the director of fish and wildlife to cause an inspection of the reserve to be made for the purpose of determining whether said reserve or any part thereof should be retained as a state oyster reserve or vacated.

RCW 79.96.110: Vacation of reserve-Lease of lands.

In case the director of fish and wildlife approves the vacation of the whole or any part of said reserve, the department of natural resources may vacate and offer for lease such parts or all of said reserve as it deems to be for the best interest of the state, and all moneys received for the lease of such lands shall be paid to the department of natural resources in accordance with *RCW 79.94.190: PROVIDED, That nothing in RCW 79.96.090 through 79.96.110 shall be construed as authorizing the lease of any tidelands which have heretofore, or which may hereafter, be set aside as state oyster reserves in Eld Inlet, Hammersley Inlet, or Totten Inlet, situated in Mason or Thurston counties: PROVIDED FURTHER, That any portion of Plat 138, Clifton's Oyster Reserve, which has already been vacated, may be leased by the department.

WAC 332-30-157: Commercial clam harvesting.

(1) Commercial clam beds on aquatic lands shall be managed to produce an optimum yield.
(2) The boundaries of clam tracts offered for lease shall be established and identified to avoid detrimental impacts upon significant beds of aquatic vegetation or areas of critical biological significance as well as prevent unauthorized harvesting.
(3) The methods of harvest may only be those as established by law and certified by the department of fisheries.
(4) Surveillance methods will be employed to insure that trespass as well as off-tract harvesting is prevented.
(5) Harvesters must comply with all lease provisions. Noncompliance may result in lease suspension or cancellation upon notification.
(6) Harvesters must comply with all applicable federal, state and local rules and regulations. Noncompliance may result in lease suspension or cancellation upon notification.
(7) If appropriate, the department may secure all necessary permits prior to leasing.

Discussion on aquaculture: shellfish cultivation

In summary of the RCWs above, when the department receives an application for lease of state-owned aquatic lands for harvesting, planting or cultivating oysters, clams or other shellfish, the department must notify the Washington

Department of Fish and Wildlife (WDFW). WDFW will inspect the lands and may prohibit the leasing of the land if necessary to ensure protection of existing natural oyster beds and to secure adequate seeding of these beds. Also, if the land is to be leased, WDFW will establish the value of any existing natural shellfish. The applicant must pay this value, as well as the costs of WDFW investigating the existing natural shellfish and establishing the value. Such a review is not necessary for renewal of leases.

WDFW will similarly review applications for lease of state-owned aquatic lands which have been set aside as oyster reserves, to determine if the reserve should be vacated. Oyster reserves are managed by WDFW until they are vacated; then DNR manages, leases and collects rents from these lands.

An initial lease for shellfish cultivation will last from five to ten years. A renewal may be for up to thirty years, but should be less, unless necessitated by financing needs of the aquaculture operation. If state-owned aquatic lands leased for shellfish cultivation are not used, or are used for any other purpose, all rights to the land revert to the state and the department may take possession of the lands. This condition must be a part of all such leases.

AQUACULTURE: TRIBAL ISSUES

Discussion on aquaculture: tribal issues

Treaties guarantee half of the naturally occurring harvestable shellfish, as well as other rights, to federally recognized tribes in Washington. The judicial ruling upholding the tribal rights to harvest shellfish requires that the department accommodate the quantity of natural shellfish that might occur on beds that are now, or will be, used for the artificial cultivation of shellfish. The department should determine whether and how these rights apply to any given shellfish lease. Because this ruling,

known as the Rafeedie decision, is relatively new, land managers should consult with the Division on steps to take to comply with the decision.

Aquatic lands

SEE: State-owned aquatic lands.

Aquatic Lands Enhancement Account

RCW 79.24.580 Deposit, use of proceeds from sale or lease of aquatic lands or valuable materials therefrom -- Aquatic lands enhancement account.

After deduction for management costs as provided in RCW 79.64.040 and payments to towns under RCW 79.92.110(2), all moneys received by the state from the sale or lease of state-owned aquatic lands and from the sale of valuable material from state-owned aquatic lands shall be deposited in the aquatic lands enhancement account which is hereby created in the state treasury. After appropriation, these funds shall be used solely for aquatic lands enhancement projects; for the purchase, improvement, or protection of aquatic lands for public purposes; for providing and improving access to such lands; and for volunteer cooperative fish and game projects. During the fiscal biennium ending June 30, 2001, the funds may be appropriated for boating safety, shellfish management, enforcement, and enhancement and for developing and implementing plans for population monitoring and restoration of native wild salmon stock.

Discussion on Aquatic Lands Enhancement Account

The Aquatic Lands Enhancement Account (ALEA) receives much of the revenue generated from the department's management of state-owned aquatic lands. The remainder

goes to the Resource Management Cost Account to pay for management costs. SEE ALSO: Resource Management Cost Account.

The ALEA account is a key mechanism for investing income from state-owned aquatic lands in projects that directly benefit the people of Washington. Funding is appropriated by the Legislature to the department and then is granted by the department to cities, counties, ports, tribes, and state agencies. Between 1984 and 1999, the department's ALEA grants invested more than $23 million in more than 180 projects to improve access to waterfront areas and to provide other public benefits from the use of state-owned aquatic lands. The department should highlight the benefits from the ALEA program that flow directly to communities across the state from responsible management of state-owned aquatic lands.

ALEA offers grants to state agencies, local governments, tribes, and other jurisdictions to:

- Rehabilitate critical marine, estuarine and riverine aquatic habitat in areas proposed for federal Endangered Species Act listings of salmon.
- Re-establish naturally self-sustaining aquatic riparian areas that are fully integrated into the larger ecological landscape.
- Purchase and protect existing high-value aquatic habitats, allowing natural processes to occur.
- Create or rehabilitate aquatic recreational opportunities, pedestrian-oriented projects that provide immediately usable waterfront access, and other ways for people simply to get to the water.
- Increase public awareness of state-owned aquatic lands as a finite natural resource and irreplaceable public heritage.

The Division manages the ALEA grant program, including developing program guidelines and selection criteria, distributing information on the grant application process, managing the selection process, administering grant agreement contracts, and monitoring operation and maintenance of completed projects.

Region staff can contribute to the ALEA program in several ways, including:

- Being aware of the ALEA projects in their Region.
- Identifying areas where projects should be encouraged.
- Informally checking on the progress of projects under development in the area.
- Joining Division staff on site visits to provide local knowledge of environmental conditions and recreational opportunities.
- Participating in the annual grant review process.

Aquatic land use planning

WAC 332-30-100: Introduction.

Subsection (2)(e) of this section shall not apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114). State-owned aquatic lands include approximately 1,300 miles of tidelands, 6,700 acres of constitutionally established harbor areas and all of the submerged land below extreme low tide which amounts to some 2,000 square miles of marine beds of navigable waters and an undetermined amount of fresh water shoreland and bed. These lands are managed as a public trust and provide a rich land base for a variety of recreational, economic and natural process activities. Management concepts, philosophies, and programs for state-owned

aquatic lands should be consistent with this responsibility to the public.

These lands are "a finite natural resource of great value and an irreplaceable public heritage" and will be managed to "provide a balance of public benefits for all citizens of the state." (RCW 79.90.450 and 79.90.455)

(1) Management goals. Management of state-owned aquatic lands will strive to:

(a) Foster water-dependent uses;

(b) Ensure environmental protection;

(c) Encourage direct public use and access;

(d) Promote production on a continuing basis of renewable resources;

(e) Allow suitable state aquatic lands to be used for mineral and material production; and

(f) Generate income from use of aquatic lands in a manner consistent with the above goals.

(2) Management methods. To achieve the above, state-owned aquatic lands will be managed particularly to promote uses and protect resources of state-wide value.

(a) Planning will be used to prevent conflicts and mitigate adverse effects of proposed activities involving resources and aquatic land uses of state-wide value. Mitigation shall be provided for as set forth in WAC 332-30-107(6).

(b) Areas having unique suitability for uses of state-wide value or containing resources of state-wide value may be managed for these special purposes. Harbor areas and scientific reserves are examples. Unique use requirements or priorities for these areas may supersede the need for mitigation.

(c) Special management programs may be developed for those resources and activities having state-wide value. Based on the needs of each case, programs may prescribe special management procedures or standards such as lease auctions, resource inventory, shorter lease terms, use preferences, operating requirements, bonding, or environmental protection standards.

(d) Water-dependent uses shall be given a preferential lease rate in accordance with RCW 79.90.480. Fees for nonwater-dependent aquatic land uses will be based on fair market value.

(e) Research and development may be conducted to enhance production of renewable resources.

WAC 332-30-107: Aquatic land planning.

Subsection (4) of this section shall not apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) Multiple use. The aquatic lands of Washington are a limited and finite resource. Management of these lands will allow for multiple use by compatible activities to the greatest extent feasible.

(2) Planning objectives. Aquatic land management will strive for the best combination of aquatic uses to achieve the goals in WAC 332-30-100. Planning should allow for a variety of uses and activities, such as navigation; public use; production of food; energy; minerals and chemicals; and improvement of aquatic plant and animal habitat, occurring simultaneously or seasonally on state-owned aquatic lands.

(3) Shoreline management. The Shoreline Management Act and shoreline master program planning, together with supplemental planning as described in subsection (5) of this section, will be the primary means for identifying and providing appropriate uses of state-wide value.

(4) Coordination. Coordination with shoreline management programs will be accomplished by:

(a) Identifying aquatic land areas of particular state-wide value for public access, habitat and water-dependent and renewable resource use.

(b) Informing appropriate shoreline planning bodies of the location and particular value of aquatic lands identified in (a) of this subsection.

(c) Participating in shoreline planning and suggesting ways to incorporate and balance state-wide values.

(d) Proposing to the appropriate local jurisdiction that shoreline plans be updated when new information concerning state-wide values becomes available or when existing plans do not adequately address state-wide values.

(5) Supplemental planning. The department (for aquatic lands not covered under port management agreements) or port districts (for aquatic lands managed under port management agreements) may supplement the shoreline master program planning process with management plans necessary to meet the constitutional and statutory proprietary responsibilities for state-owned aquatic lands. Plans developed and implemented under this subsection will involve aquatic lands, resources, and activities requiring intensive

management, special protection, or conflict resolution and will be developed when these needs are not provided for by shoreline master program planning. Aquatic land uses and activities implemented through this supplemental planning process will be consistent with adopted shoreline master programs and the Shoreline Management Act. Planning activities will be closely coordinated with local, state, and federal agencies having jurisdiction and public participation will be encouraged.
(6) Mitigation. Shoreline master program planning and additional planning processes described in subsection (5) of this section will be the preferred means for identifying and mitigating adverse impacts on resources and uses of state-wide value. In the absence of such planning directed to these values and uses, the department (for aquatic lands not covered under port management agreements) or port districts (for aquatic lands managed under port management agreements) will mitigate unacceptable adverse impacts on a case-by-case basis by the following methods in order of preference:

(a) Alternatives will be sought which avoid all adverse impacts.
(b) When avoidance is not practical, alternatives shall be sought which cause insignificant adverse impacts.
(c) Replace, preferably on-site, impacted resources and uses of state-wide value. It must be demonstrated that these are capable of being replaced.
(d) Payment for lost value, in lieu of replacement, may be accepted from the aquatic land user in limited cases where an authorized use reduces the economic value of off-site resources, for example, bacterial pollution of nearby shellfish beds.

WAC 332-30-134: Aquatic land environmental protection.

(1) Planning. Coordinated, interagency planning will be encouraged to identify and protect natural resources of state-wide value.
(2) Reliance on other agencies. Aquatic land natural resources of state-wide value are protected by a number of special state and federal environmental protection programs including: State Shorelines Management Act, Environmental Policy Act, Hydraulics Project Approval, National Environmental Policy Act, Federal Clean Water Act, Fish and Wildlife Coordination Act and section 10 of the Rivers and Harbors Act. Governmental agencies with appropriate jurisdiction and expertise will normally be depended on to evaluate environmental impacts of individual projects and to incorporate

appropriate protective measures in their respective project authorizations.
(3) Method. Leases and other proprietary aquatic land conveyances may include environmental protection requirements when:

(a) Regulatory agencies' approvals are not required;
(b) unique circumstances require long-term monitoring or project performance; or
(c) substantial evidence is present to warrant special protection.

AQUATIC LAND USE PLANNING: AQUASCAPE PLANS

Discussion on aquatic land use planning: aquascape plans

An aquascape plan is simply a land use plan for aquatic lands. It may include many of the elements found in upland comprehensive plans: identification of current uses and critical natural areas, identification of land use needs and goals, and designation of areas for certain uses or for natural reserves.

The Division has drafted an aquascape plan template. The department hopes to apply this template to many areas across the state, for both saltwater and freshwater, in the next few years. Writing aquascape plans will require extensive cooperation between the Division, Regions, and many others in the department.

Currently, the Division is coordinating major planning efforts in Commencement Bay and Bellingham Bay. These are intended to address specific issues in these bays, notably contaminated sediments, and to serve as pilot efforts for aquascape planning.

AQUATIC LAND USE PLANNING: WATERSHED PLANS

Discussion on aquatic land use planning: watershed plans

Watershed planning has been an on-going process across the state for a number of years, with varying degrees of geographic size, content scope, and level of participation. Watershed planning focuses primarily on upland river basins, as opposed to bays or other marine waters. Whenever possible, the department should be actively involved in all watershed planning that will affect state-owned aquatic lands, including rivers and marine waters.

A Water Resource Inventory Area (WRIA) is a watershed-based planning unit defined by the Department of Ecology. There are 62 WRIAs in Washington, determined by drainages to common water bodies. A Watershed Administrative Unit (WAU), smaller than a WRIA, is the basic hydrologic unit used for watershed analysis. There are nearly 800 WAUs in the state.

The department has signed an MOU with other state agencies on the implementation of watershed planning under a law passed in 1998 (SHB 2514), which provides funds for watershed planning by a single WRIA or a multi-WRIA effort. This MOU stipulates that if the department is requested or invited to participate by the WRIA or multi-WRIA planning group, the department will either assign a regional staff designee to participate or agree to let the regional Ecology staff person represent the department's interests.

Region Managers, in consultation with the Division Manager, shall identify whether the department should participate in a particular watershed planning process and at what level and intensity. Staff should monitor local watershed planning work through the department's designee. Where Ecology is the representative for the department on watershed planning, staff should identify concerns related to state-owned aquatic lands, and work closely with the Region

growth management coordinator to make sure these concerns are addressed in the watershed planning group's work before the final watershed plan is complete and finalized.

Aquatic plants

SEE: Vegetation, aquatic

Archaeological resources

RCW 79.90.565: Archaeological activities on state-owned aquatic lands--Agreements, leases, or other conveyances.

After consultation with the director of community, trade, and economic development, the department of natural resources may enter into agreements, leases, or other conveyances for archaeological activities on state-owned aquatic lands. Such agreements, leases, or other conveyances may contain such conditions as are required for the department of natural resources to comply with its legal rights and duties. All such agreements, leases, or other conveyances, shall be issued in accordance with the terms of chapters 79.90 through 79.96 RCW.

Discussion on archaeological resources

While statutes on state-owned aquatic lands discuss the major role that water-dependent industries and activities have played in the state's history, the Archaeological Sites and Resources Act also recognizes archaeology as a public benefit. The “public has an interest in the conservation, preservation, and protection of the state's archaeological resources, and the knowledge to be derived and gained from the scientific study of these resources.” (Chptr. 27.53 RCW) If an archeological or historical site is uncovered or identified, the department will take appropriate steps to evaluate the special management needs of the site.

The Office of Archaeology and Historic Preservation (OAHP) at the Department of Community Trade and Economic Development (DCTED) maintains the Washington State Inventory of Historic Places. This inventory is a listing of the state's known archaeological and cultural resources, including those that may be on state-owned aquatic lands. In most places, there is not adequate information on the extent of archaeological sites in intertidal and subtidal areas. The department has a responsibility to manage these resources, if known or likely to exist, for the benefit of the public.

Underwater archaeological resources include artifacts and features that have been lost or intentionally placed in the water, or upland sites covered by water from dams or from natural water rise.

Lost items may include railroad cars, prehistoric stone tools, Euro-American metal anchors and fishing gear, airplanes, and bridge remnants. For example, the old Tacoma Narrows Bridge, known as "Galloping Gertie," collapsed into the waters of the Tacoma Narrows in 1940. The site has been placed on the National Register of Historic Places. Many other bridge remnants also may exist.

In 1988, the federal government gave the state of Washington title to all abandoned shipwrecks embedded in the submerged lands of the state. There may be more than 1,000 as yet unlocated state-owned shipwrecks.

Prehistoric cultural resources intentionally placed in or near water may include Native American canoe runs, petroglyphs and pictographs, fish traps or weirs, and trash dumps. Cultural resources found in water have exciting implications for prehistoric archaeology, as normally perishable materials such as basketry and wood are often preserved underwater. Examples of prehistoric trash dumps with preserved materials include the 3,000 year old Hoko River wet site in Clallam County, the 2,000 year old Biderbost site in Snohomish County, and the 1,000 year old Munk Creek wet

site in Skagit County. Prehistoric trash dumps should be considered a part of the associated upland sites, and both should be appropriately protected.

Many inundated archaeological sites are behind dams. Inundated sites include prehistoric villages, campsites, and historic forts, homesteads, towns, and waterfronts.

The rising levels of sea, rivers and lakes has covered older villages but often not resource exploitation locations -- such as animal kill sites, quarries, plant gathering and stone working places -- which were located away from coastlines. Historically known Northwest Coast villages were usually from five to twenty feet above the high water mark, near the mouths of rivers, at the meeting of waterways, or on sheltered bays or inlets. Older sites in many of these locations have been destroyed by wave action or are now under water.

Land managers who believe they might have identified a significant cultural resource on state-owned aquatic lands should, in consultation with the Division, recommend that it be registered with the Washington State Office of Archaeology and Historic Preservation. As part of that process, submission of a short form gives the state right-of-first refusal for salvage rights for a five year period, in case there are valuable materials connected with the resource (for example, shipwreck cargo). This gives the department additional leverage under RCW 27.53 and WAC 25-46 beyond its proprietary rights.

Artificial reefs

RCW 79.68.080: Fostering use of aquatic environment--Limitation.

The department of natural resources shall foster the commercial and recreational use of the aquatic environment for production of food, fibre, income, and public enjoyment from state-owned aquatic lands under its jurisdiction and from associated waters, and to this end the department may develop and improve production and harvesting of seaweeds and sealife attached to or growing on aquatic land or contained in aquaculture containers, but nothing in this section shall alter the responsibility of other state agencies for their normal management of fish, shellfish, game and water.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(11) Certain lands may be modified in order to improve their productivity by adding structures such as artificial reefs or materials and by establishment of biological habitats such as eel grass and kelp beds as well as marsh areas.

WAC 332-30-169: Artificial reefs (RCW 79.68.080).

Artificial reefs constructed of a variety of materials is an accepted method of increasing habitat for rock dwelling fish and invertebrates. In areas devoid of natural reefs, artificial reefs serve to increase the recreational potential of the area.

(1) Artificial reefs may be installed on aquatic lands by public groups or government agencies. However the sponsoring group or agency proposing such installation must submit their plan for review and approval to the reef siting committee prior to applying for permits. The artificial reef siting committee is a technical committee of the aquatic resources advisory committee and is composed of representatives of the departments of fisheries, ecology, environmental protection agency, national marine fisheries service and fish and wildlife service. The department chairs the committee. All permits must be acquired by the sponsoring group or agency prior to installation. The department may assist in and/or undertake reef design, construction, location, permit application and site inspection.

(2) Artificial reefs may be installed on aquatic lands under the following guidelines.

(a) Large reefs built by community groups rather than smaller reefs built by individuals are encouraged.

(b) Artificial reefs shall have a marking buoy meeting coast guard regulations and shall be marked on authorized navigation charts.

(c) Leasing of bedlands is not required for artificial reefs established for public use, however, a public use agreement (see WAC 332-30-130(9)) must be issued. A public reef in harbor areas requires a lease. Private reefs are not permitted.

(d) Artificial reefs should be located so that public upland access to the water is available, i.e., county or city parks, road frontage or endings adjacent to public aquatic lands. Due to the predominance of private shorelands, tidelands and uplands, public access may be restricted to boats only. The department does not promote or condone trespass on private property.

(e) A proposed artificial reef shall not conflict with existing natural rocky fish habitats.

(f) In selecting an artificial reef site shipping lanes, designated harbor areas and areas of marine traffic concentration shall be avoided. A thousand feet of horizontal clearance is recommended.

(g) Artificial reefs shall be of sufficient depth to allow unimpeded surface navigation. A general rule of thumb is that clearance be equivalent to the greatest draft of ships or barges using the area, plus ten feet as measured from mean lower low water.

(h) Artificial reefs shall not conflict with commercial or recreational fishing, shellfish harvesting areas or with known or potential aquaculture areas.

(i) Artificial reef design shall optimize "edge effect." Reef materials should not be scattered but clumped with small open spaces between clumps.

(ii) Artificial reefs shall be constructed of long-lasting, non-polluting materials.

(iii) Tires used as construction material shall be tied together to form sub units. The ties must not deteriorate in the marine environment and should consist of such material as polypropylene rope, stainless steel or plastic strapping. Tires must be cut or drilled to allow easy escapement of trapped air. Tires must be weighted in areas where currents or wave action may move them.

(iv) Cement pipe may be used as construction material. The pipe should be transported and positioned on the bottom so as to minimize breakage.

(vi) Rock or concrete chunks may be used as construction material.

(vii) Vessels may be used as an artificial reef. Size and type of vessels will be considered on a case by case basis.

(k) Artificial reefs shall normally be located seaward of the minus 18 foot contour as measured from mean lower low water.
(l) If a reef is for the exclusive use of either line fishermen or divers, it shall be so identified at the site.

Discussion on artificial reefs

The department may allow the creation of artificial reefs as described above. However, the department is also obligated to ensure environmental protection on state-owned aquatic lands. SEE ALSO: Environmental protection.

In general, the placement of artificial materials in a healthy natural area is contrary to protecting the environment. In fact, the presence of tires, cement pipe, or concrete chunks on aquatic lands is generally considered a pollutant. Also, the disposal of vessels as artificial reefs can introduce oils, paints, and other toxic materials into the water. The department will not consider the placement of artificial reefs unless such concerns can be addressed and the reef constitutes a very significant habitat enhancement.

Currently, there is no active reef siting committee.

B

Bedlands

RCW 79.90.050: "Beds of navigable waters."
Whenever used in chapters 79.90 through 79.96 RCW, the term "beds of navigable waters" means those lands lying waterward of and below the line of navigability on rivers and lakes not subject to tidal flow, or extreme low tide mark in navigable tidal waters, or the outer harbor line where harbor area has been created.

Discussion on bedlands

The beds of navigable waters, also known as bedlands, are part of state-owned aquatic lands, and are generally those areas which are always covered by water. However, such lands within harbor areas are excluded from the definition of bedlands and are treated differently under the law. SEE ALSO: State-owned aquatic lands; Harbor areas.

The state owns most beds of navigable waters. A small percentage of bedlands were conveyed to private parties early in statehood under now-repealed statutes authorizing the conveyance of certain parts of oyster beds and through early land claims. Today, bedlands cannot be sold or given to any entity.

With the exception of harbor areas, bedlands may be leased only to the owner of abutting private tidelands or shorelands or to the lessee of abutting public tidelands or shorelands. However, if the abutting tidelands, shorelands, or uplands are not improved or occupied, then the department may lease the bedlands to any party for log booming for up to ten years. SEE ALSO: Use authorizations.

Board of Natural Resources

RCW 79.90.080: Board of natural resources--Records--Rules and regulations.
The board of natural resources acting as the harbor line commission shall keep a full and complete record of its proceedings relating to the establishment of harbor lines and the determination of harbor areas. The board shall have the power from time to time to make and enforce rules and regulations for the carrying out of the provisions of chapters 79.90 through 79.96 RCW relating to its duties not inconsistent with law. [1982 1st ex.s. c 21 § 14.]

Discussion on Board of Natural Resources

The Board of Natural Resources sets harbor lines, approves rules (WACs) for the department, approves sales of second class shorelands, and approves exchanges of state-owned aquatic lands. The Commissioner of Public Lands directs all other decisions and administration of the department. SEE ALSO: Harbor areas; State-owned aquatic lands; Exchanges and acquisitions.

Bridges and roads

RCW 79.91.080: United States of America, state agency, county, or city right of way for roads and streets over, and wharves over and upon aquatic lands.
Any county or city or the United States of America or any state agency desiring to locate, establish, and construct a road or street over and across any aquatic lands, or wharf over any tide or shore lands, belonging to the state, shall by resolution of the legislative body of such county, or city council or other governing body of such city, or proper agency of the United States of America or state agency, cause to be filed with the department of natural resources a petition for a right of way for such road or street or wharf in accordance with the provisions of RCW

79.01.340. The department may grant the petition if it deems it in the best interest of the state and upon payment for such right of way and any damages to the affected aquatic lands.

RCW 79.91.100: Public bridges or trestles across waterways and aquatic lands.

Counties, cities, towns, and other municipalities shall have the right to construct bridges and trestles across waterways heretofore or hereafter laid out under the authority of the state of Washington, and over and across any tide or shore lands and harbor areas of the state adjacent thereto over which the projected line or lines of highway will run, if such bridges or trestles are constructed in good faith for the purpose of being made a part of the constructed line of such a highway, upon payment for any such right of way and upon payment for any damages to those aquatic lands affected.

Discussion on bridges and roads

Bridges and roads are a type of linear project and a type of nonwater-dependent use. SEE ALSO: Linear projects; Nonwater-dependent uses.

Counties, cities, and state agencies have the right to construct bridges across waterways and adjoining state-owned aquatic lands, including harbor areas, if the bridge is part of a highway or road. The government must pay full market value for the right of way, and must pay for any damage to affected aquatic lands. SEE ALSO: Valuation.

Counties, cities, and state and federal agencies may apply to construct a road or street across any aquatic lands. The difference is that a road typically involves filling the aquatic lands, while a bridge goes above them. Again, the government must pay full market value for the right of way, and must pay for any damage to affected aquatic lands. Also, for roads, unlike bridges, the department has the discretion to grant this right-of-way based on whether "it is in the best interest of the state." In addition, the Washington

State Department of Transportation has certain statutory authorities regarding roads, as described below.

In granting an easement for a bridge or road, especially where the department has greater discretion over roads, the department may require terms in the easement to provide for navigation and commerce, ensure environmental protection, and provide for the department's other statutory obligations and the public benefits of state-owned aquatic lands. In reviewing these applications, the department should apply the same standards as for other linear projects or nonwater-dependent uses. SEE ALSO: Public benefits; Navigation; Environmental protection.

Ideally, the department should be involved at least 18 months in advance in the design and permitting process to create and take advantage of opportunities to improve bridge or road design. In fact, the department should consult with state and local agencies on their capital project plans at least five years in advance of construction. If possible, the department should also consider alternate locations where a bridge or road could be located to serve the same purpose with lesser impacts. If a bridge or road requires regulatory environmental permits, these must be granted before the department will issue the final easement document. SEE ALSO: Regulatory agencies and permits.

Damages for which payment is due include both the initial impacts associated with construction of a bridge and any impacts which occur later as a direct result of the bridge. For example, payment would be due if the bridge collapsed and harmed aquatic habitat, as well as if road run-off caused more subtle but still identifiable impacts. Damage payments may be in the form of non-monetary habitat or environmental enhancements, or public access, if approved by the department. The easement must include a mechanism for obtaining damage payments after initial construction of the bridge.

For bridges and roads owned by a government agency, the department will grant an easement for the expected life of the structure, up to 100 years. That is, the easement will remain in effect so long as the bridge or road is usable and used, but no longer than 100 years. If a bridge or road is to be replaced by a newer bridge or road, or by anything else, the existing easement would expire and a new easement would be developed for the new structure. Also, if a bridge or road is no longer primarily used for its original primary purpose (e.g., car travel, railroad travel), or if the bridge or road is not used at all for more than five years, the department will cancel the easement. The easement document must contain clauses to this effect.

Like other linear projects, the department will require re-opener clauses that allow the department to re-evaluate relevant aspects of the lease at least every ten years to respond to unexpected navigational or environmental concerns. Where appropriate, the re-opener clause should be tied to the schedule of applicable regulatory environmental reviews. If an easement is reopened, the department will require that the government agency cover the costs of any necessary review or bridge or road alterations.

BRIDGES AND ROADS: DEPARTMENT OF TRANSPORTATION

RCW 47.12.026 Acquisition of state lands or interests or rights therein -- Easements -- Removal of materials -- Relocation of railroad tracks.

(1) The department of transportation may acquire an easement for highway or toll facilities right of way or for ferry terminal or docking facilities, including the right to make necessary fills, on, over, or across the beds of navigable waters which are under the jurisdiction of the department of natural resources, in accordance with the provisions of RCW 47.12.023, except that no charge may be made to the department of transportation for such an easement.

(2) The department of transportation may obtain an easement for highway or toll facilities purposes or for ferry terminal or docking facilities on, over, or across harbor areas in accordance with RCW 47.12.023 but only when the areas are approved by the harbor line commission as a public place for public landings, wharves, or other public conveniences of commerce or navigation. No charge may be made to the department of transportation for such an easement.
(3) Upon the selection by the department of transportation of an easement for highway or toll facilities right of way or for ferry terminal or docking facilities, as authorized in subsections (1) and (2) of this section, the department of natural resources shall cause to be executed and delivered to the department of transportation an instrument transferring the easement. Whenever the state no longer requires the easement for highway or toll facilities right of way or for ferry terminal or docking facilities, the easement shall automatically terminate and the department of transportation shall, upon request, cause to be executed an instrument relinquishing to the department of natural resources all of its interest in the lands.
(4) The department of transportation, pursuant to the procedures set forth in RCW 47.12.023, may remove sand and gravel and borrow materials and stone from the beds of navigable waters under the jurisdiction of the department of natural resources which lie below the line of ordinary high water upon the payment of fair market value per cubic yard for such materials to be determined in the manner set forth in RCW 47.12.023.
(5) The department of transportation may acquire full jurisdiction over lands under the jurisdiction of the department of natural resources including the beds of navigable waters that are required for the relocation of the operating tracks of any railroad that will be displaced by the acquisition of such railroad property for state highway purposes. The department of transportation may exchange lands so acquired in consideration or partial consideration for the land or property rights needed for highway purposes and may cause to be executed a conveyance of the lands in the manner prescribed in RCW 47.12.150. In that event the department of transportation shall pay to the department of natural resources, as just compensation for the acquisition, the fair market value of the property, including the beds of any

navigable waters, to be determined in accordance with procedures set forth in RCW 47.12.023.

Discussion on bridges and roads: Department of Transportation

The Washington State Department of Transportation (DOT) has the right to acquire an easement for highways, toll facilities, and ferry terminal or docking facilities, including necessary fills, "on, over or across the beds of navigable waters" under the department's jurisdiction. DOT may obtain a similar easement in harbor areas if the Harbor Line Commission has approved those areas for public landings, wharves, and other public conveniences of commerce or navigation. Such easements are free of charge to DOT. The department must grant an easement to DOT for such facilities, but may require terms in the easement to provide for navigation and commerce, ensure environmental protection, and provide for the department's other statutory obligations and public benefits of state-owned aquatic lands, as described above. DOT must acquire any needed regulatory environmental permits before the department will issue the final easement document.

BRIDGES AND ROADS: RAILROADS

RCW 79.91.090: Railroad bridge rights of way across navigable streams.

Any railroad company heretofore or hereafter organized under the laws of the territory or state of Washington, or under any other state or territory of the United States, or under any act of the congress of the United States, and authorized to do business in the state and to construct and operate railroads therein, shall have the right to construct bridges across the navigable streams within this state over which the line or lines of its railway shall run for the purpose of being made a part of said railway line, or for the more convenient use thereof, if said bridges are so constructed as not to interfere with, impede, or obstruct navigation on such streams: PROVIDED, That payment for any such right of way and any damages to those aquatic lands affected be first paid.

RCW 79.91.110: Common carriers may bridge or trestle state waterways.

Any person authorized by any state or municipal law or ordinance to construct and operate railroads, interurban railroads or street railroads as common carriers within this state, shall have the right to construct bridges or trestles across waterways laid out under the authority of the state of Washington, over which the projected line or lines of railroad will run. The bridges or trestles shall be constructed in good faith for the purpose of being made a part of the constructed line of such railroad, and may also include a roadway for the accommodation of vehicles and foot passengers. Full payment for any such right of way and any damages to those aquatic lands affected by the right of way shall first be made.

Discussion on bridges and roads: Railroads

Railroad companies and common carriers have rights similar to those of cities and counties to construct railroad bridges over navigable streams or waterways. Again, the railroad must pay for the right-of-way and for damages to the aquatic lands.

Applications for bridges or roads from private parties other than railroads have no special statutory rights, and will be treated and evaluated as other linear projects and nonwater-dependent uses. SEE ALSO: Linear projects; Nonwater-dependent uses.

Bulkheads

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(14) State-owned second class tidelands and shorelands will be maintained free of bulkheads and residences except when in the public interest.
(15) The use of beach material from tidelands or shorelands for backfill of bulkheads and seawalls, landfill and as aggregate will not be allowed except when in the public interest.

Discussion on bulkheads

The department strongly discourages bulkheads because they are extremely destructive to inter-tidal and nearshore aquatic habitats. Besides physically occupying parts of these habitats, bulkheads and similar structures tend to disrupt wave and flow patterns, causing the loss of substrate habitat for many plants and animals. SEE ALSO: Environmental protection.

The WAC above discusses second class tidelands and shorelands because these are usually in more rural areas where the habitat is relatively intact and bulkheads are less likely to be necessary. Bulkheads may more often be approved in urban first class areas, as part of marine terminals or similar developments, but still will only be approved when they are in the larger public interest.

Many bulkheads are installed on private tidelands or shorelands or on uplands abutting the shore where they can greatly affect state-owned aquatic lands. The department does not have direct authority over construction on these lands, but should express its view on bulkheads whenever possible in these cases, such as during permit review processes. SEE ALSO: Regulatory agencies and permits.

C

Coastal Zone Management Program

Discussion on Coastal Zone Management Program

The Coastal Zone Management Program is operated by the Department of Ecology. A certification by the Coastal Zone Management Program is required for U.S. Army Corps of Engineers' authorized projects and other federally licensed or permitted projects within designated coastal zone areas in 15 counties.

Unlike other certifications that are issued by the state, the project proponent prepares the Coastal Zone Certification, which includes a project description, a brief assessment of the impacts, and a statement that the project complies with the Coastal Zone Management Program. Ecology reviews the certification and the proposed project for consistency with state environmental requirements, including shoreline permits. If the project is consistent, Ecology concurs with the certification in writing. Ecology's shorelands program reviews shoreline permits for consistency and can provide information about a specific proposal.

Department staff should review notices of proposed projects or activities covered by the Coastal Zone Management Program. Region staff should be in contact with Ecology's Shorelands Program regional staff working on the Coastal Zone Management Program and the associated grant program.

Because federally-authorized projects need to be consistent with applicable state regulations under the Coastal Zone Management Plan, a comment period is provided. During this period, the department may request that a "hold" be placed on permits for projects which have unacceptable impacts on state-owned aquatic lands.

Commercial and industrial uses

RCW 79.90.465: Definitions.

(11) "Terminal" means a point of interchange between land and water carriers, such as a pier, wharf, or group of such, equipped with facilities for care and handling of cargo and/or passengers.

WAC 332-30-106 Definitions.

(10) "Commerce" means the exchange or buying and selling of goods and services. As it applies to aquatic land, commerce usually involves transport and a land/water interface.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(4) Development of additional sites for waterborne commerce and terminal and transfer facilities will generally not be authorized on second class tidelands and shorelands if existing first class tidelands, shorelands and harbor areas can meet the need.

Discussion on commercial and industrial uses

Commercial and industrial uses of state-owned aquatic lands include major commercial terminals, cargo transfer facilities, ferry terminals and other passenger facilities, and shipyards conducting boat construction, repair and maintenance. Only those facilities which must be on the water are considered water-dependent. For example, areas for loading and unloading cargo from a boat are water-dependent, but areas for storing or processing that cargo generally are nonwater-

dependent. SEE ALSO: Water-dependent uses; Nonwater-dependent uses

Applications for commercial and industrial uses must be carefully evaluated by the department because of the higher than normal risk of sediment contamination, loss of habitat, and other adverse environmental impacts, as well as possible interference with navigation. In particular, the department must determine whether the proposal is likely to increase the state's risk of environmental or financial liability. SEE ALSO: Sediments; Environmental protection; Navigation.

Environmental concerns and conditions are generally more common with larger or more heavily industrialized uses. For example, the department must pay special attention to possible environmental impacts from petroleum loading and unloading facilities because of the potential hazards from both large spills and chronic small leaks.

All uses of state-owned aquatic lands which may cause adverse environmental impacts must include mitigation for the impacts. For commercial and industrial uses, it is especially important to discuss mitigation with the applicant early in the process as the proposal might require significant alteration, or even elimination, of some or all of the proposal which causes unacceptable impacts.

Environmental audits and assessments can be valuable tools for reviewing the impacts of commercial, industrial or transportation uses and other uses. While there are some precise regulatory definitions, in general an environmental audit and assessment should include review of historical and current use of the parcel to identify any possibility of contamination or other environmental concerns, and any need for on-site testing of structures, soils, or sediments. The goal is to identify environmental problems before they get worse so they can be addressed in the subsequent lease, to provide the state with a baseline for evaluating future environmental conditions on the property, and also to protect the applicant from inadvertently taking a property interest in

contaminated land. The department will establish more complete standards for environmental audits and assessments.

Leases for any facility which will use or store potentially toxic or hazardous substances must require that the facility plan of operation address pollution control – including a monitoring plan and a spill response plan – for all potential point and non-point source pollutants, as well as the best management practices for handling listed substances. A signed and dated copy of these plans must be included as part of the lease document. SEE ALSO: Use authorizations: Plan of operations.

Assuring clear routes for navigation is a special concern for commercial, industrial, and transportation uses because these uses often include the largest human-built structures in a bay. Such structures are usually carefully designed to provide ease of navigational access to that particular use. The department must ensure, however, that they also allow ample navigational access for other current or potential uses in or through the area. SEE ALSO: Navigation.

The department will routinely monitor existing docks and piers to assure that expansion has not occurred beyond the authorized areas, paying particular attention to the outer harbor lines. SEE ALSO: Harbor areas.

Condominiumization

SEE: Marinas and moorage facilities.

Cultural resources

SEE: Archeological resources.

D

Dredging

SEE: Sediments.

E

Easements

SEE: Use authorizations, or refer to the purpose of the easement.

Ecological functions

SEE: Environmental protection.

Endangered Species Act

Discussion on Endangered Species Act

The Endangered Species Act (ESA) is a federal law triggered when the population of a species declines to a critical condition. The National Marine Fisheries Service and the United States Fish and Wildlife Service share responsibility for administering the ESA. The agencies go through a multi-step process to first determine whether a species is at risk, whether to list the species as "threatened" or "endangered," and whether to adopt regulations to prevent the take of the species. Along the way are other steps involving consultation with federal agencies or negotiations with various entities over habitat conservation plans.

The ESA prohibits anyone from directly killing an endangered or threatened species or harming the species or its habitat. Anyone who knowingly violates this prohibition is subject to penalties, including civil penalties up to $25,000 for

each violation and criminal penalties of up to one year imprisonment, a $100,000 fine, or both.

The obligation of the department is to abide by the rules and regulations implementing the ESA. This means that the department, like all land owners and managers, must carefully scrutinize its actions to assure that the liability to the state is minimized or adequately managed. The department should minimize risk of ESA violations even in the absence of adopted rules describing specific acceptable or unacceptable activities affecting endangered species. SEE ALSO: Environmental protection.

Activities on state-owned aquatic lands could be limited or curtailed by the listing of a species. Recent fish listings across the state may result in limitations or restrictions on state-owned aquatic lands, such as severely curtailing the number of permissible outfalls in a given area, the number of docks or piers, or construction of bridges and other structures in the water. All commercial leases and easements, including outfall easements, contaminated sediment cleanup, Port Management Agreements, and sand and gravel contracts must comply with any ESA guidelines adopted by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. Again, the department should not wait for the regulations to be adopted, but should seek to anticipate federal requirements and build them into any use authorization issued for state-owned aquatic lands. SEE ALSO: Commercial and industrial uses; Outfalls; Sediments; Ports and port management agreements; Sand and gravel.

As the federal guidelines are being developed, the department has the opportunity to provide feedback and written comment to the federal agencies. Such comments must be coordinated with the Division Manager and Executive Management. Once the take guidelines are issued, it is the responsibility of state-owned aquatic lands managers to see they are adhered to.

Prior to the issuance of take guidelines, the department needs to minimize exposure, including anticipating federal restrictions and incorporating them into use authorizations and requiring consultation between a project proponent and the relevant federal agency with responsibility over the listed species. Staff should take a conservative approach, and should err on the side of protecting the resources when commenting on environmental documents or when evaluating whether to issue a use authorization.

Environmental protection

RCW 79.90.455: Aquatic lands--Management guidelines.

The management of state-owned aquatic lands shall be in conformance with constitutional and statutory requirements. The manager of state-owned aquatic lands shall strive to provide a balance of public benefits for all citizens of the state. The public benefits provided by aquatic lands are varied and include:

(1) Encouraging direct public use and access;

(2) Fostering water-dependent uses;

(3) Ensuring environmental protection;

(4) Utilizing renewable resources. Generating revenue in a manner consistent with subsections (1) through (4) of this section is a public benefit.

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(3) The department shall consider the natural values of state-owned aquatic lands as wildlife habitat, natural area preserve, representative ecosystem, or spawning area prior to issuing any initial lease or authorizing any change in use. The department may withhold from leasing lands which it finds to have significant natural values, or may provide within any lease for the protection of such values.

WAC 332-30-100: Introduction.

(2) Management methods. To achieve the above, state-owned aquatic lands will be managed particularly to promote uses and protect resources of state-wide value.

(a) Planning will be used to prevent conflicts and mitigate adverse effects of proposed activities involving resources and aquatic land uses of state-wide value. Mitigation shall be provided for as set forth in WAC 332-30-107(6).

(b) Areas having unique suitability for uses of state-wide value or containing resources of state-wide value may be managed for these special purposes. Harbor areas and scientific reserves are examples. Unique use requirements or priorities for these areas may supersede the need for mitigation.

(c) Special management programs may be developed for those resources and activities having state-wide value. Based on the needs of each case, programs may prescribe special management procedures or standards such as lease auctions, resource inventory, shorter lease terms, use preferences, operating requirements, bonding, or environmental protection standards.

WAC 332-30-122: Aquatic land use authorization.

Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(2) Application review. In addition to other management considerations, the following special analysis shall be given to specific proposed uses:

(a) Environment.

(i) Authorization instruments shall be written to insure that structures and activities on aquatic lands are properly designed, constructed, maintained and conducted in accordance with sound environmental practices.

(ii) Uses which cause adverse environmental impacts may be authorized on aquatic lands only upon compliance with applicable environmental laws and regulations and appropriate steps as may be directed are taken to mitigate substantial or irreversible damage to the environment.

(iii) Nonwater-dependent uses which have significant adverse environmental impacts shall not be authorized.

WAC 332-30-134: Aquatic land environmental protection.

(1) Planning. Coordinated, interagency planning will be encouraged to identify and protect natural resources of state-wide value.
(2) Reliance on other agencies. Aquatic land natural resources of state-wide value are protected by a number of special state and federal environmental protection programs including: State Shorelines Management Act, Environmental Policy Act, Hydraulics Project Approval, National Environmental Policy Act, Federal Clean Water Act, Fish and Wildlife Coordination Act and section 10 of the Rivers and Harbors Act. Governmental agencies with appropriate jurisdiction and expertise will normally be depended on to evaluate environmental impacts of individual projects and to incorporate appropriate protective measures in their respective project authorizations.
(3) Method. Leases and other proprietary aquatic land conveyances may include environmental protection requirements when:

(a) Regulatory agencies' approvals are not required;
(b) unique circumstances require long-term monitoring or project performance; or
(c) substantial evidence is present to warrant special protection.

Discussion on environmental protection

"Ensuring environmental protection" is one of the key public benefits of state-owned aquatic lands that the department must strive to provide. SEE ALSO: Public benefits.

In addition, of all the things the department may wish to consider before granting a use authorization, the only qualities of state-owned aquatic lands the department is mandated by statute to consider are "natural values." After considering these natural values, the department has clear authority to protect them, by either withholding lands from leasing or requiring conditions necessary for their protection

within a lease. As part of ensuring environmental protection, the department can and will strongly protect the natural values of state-owned aquatic lands through leasing decisions. SEE ALSO: Reserves, aquatic; Use authorizations.

Ensuring environmental protection — while also encouraging public use, fostering water-dependent uses, and providing for other public benefits — requires a shift in the department's thinking from site-by-site decisions to a broader context. Site-by-site decisions about state-owned aquatic lands must always be made in the context of the larger ecosystem. For example, two keys to protecting and restoring ecosystems are retaining their capacity to recover from natural disturbances and maintaining the connections between and among functioning habitats.

Only by defining and addressing the entire ecosystem can one make the important linkages between department decisions and the long-term direct and indirect effects of those decisions. With this perspective, even some cases of seemingly "insignificant" adverse environmental impacts from proposed uses will be recognized as unacceptable if they contribute to the continuing degradation of the larger ecosystem. The department will not authorize these proposed uses. To do otherwise will fail to meet the department's goal to ensure environmental protection in the broadest sense.

For example, great attention has focused recently on several threatened or endangered salmonid populations. There are 18 additional marine species in Puget Sound, plus bull trout populations in Washington rivers, also petitioned for listing under the Endangered Species Act. Because of the Endangered Species Act listings, the department, like every other land owner or manager in the Pacific Northwest, must consider the direct and indirect impacts of all of its decisions on listed salmon populations. The most direct control the department has over impacts to salmonids is regarding the loss or alteration of nearshore vegetated nursery habitats, and the loss or degradation of spawning habitats. If the

department knowingly or carelessly causes or allows harm to salmon or to the habitat necessary for any salmon life-stage, it is not best ensuring environmental protection and also it might be found liable and suffer major legal penalties. SEE ALSO: Endangered Species Act.

The keys to addressing environmental concerns are to:

- Address environmental concerns early.
- Follow all applicable procedures and regulatory comment requirements.
- Follow through on any environmental commitments made as a condition of granting a use authorization.

ENVIRONMENTAL PROTECTION: ECOLOGICAL FUNCTIONS

Discussion on environmental protection: ecological functions

"Ecological functions" means all of the natural functions, processes and resources which provide ecosystem integrity, including:

- Habitat functions, including the areas, resources, other species, and the physical, chemical and biological processes that support the life history stages of a given species.

- Hydrogeomorphic functions, such as tidal effects and sediment erosion, movement and deposition.

- Hydrogeological processes, such as surface and groundwater storage and discharge, and energy dissipation.

- Biogeochemical processes, such as nutrient and carbon cycling.

Some ecological functions are especially critical and in need of greater attention and protection. These "critical ecological functions" include:

- Functions that support endangered, threatened, rare or highly sensitive or vulnerable species, notably the recently listed threatened salmon populations.

- Ecological functions with recognized ecological value due to high biological productivity, scarcity, support of a crucial life history stage of a species, provision of a limiting factor within an ecosystem, or provision of crucial connections or linkages within an ecosystem.

- Geographically unique habitat that supports one or more isolated species.

The goal of ensuring environmental protection requires both no net loss of habitat and, furthermore, a net gain of ecological functions and environmental values on state-owned aquatic lands. Rather than merely seeking to prevent further degradation, every proposed new approval, renewal or change in an authorized use of state-owned aquatic lands should be considered an opportunity to enhance the aquatic environment.

Requiring merely no loss of ecological functions from any given use of aquatic lands likely will fail to achieve no loss for the bay or ecosystem as a whole because of:

- The uncertain and cumulative environmental impacts of many human activities and developments;

- The ineffectiveness of some efforts to mitigate for these impacts; and

- The continuous slow degradation of aquatic habitat due to many causes beyond the department's immediate control.

Therefore, the department's intent is to issue use authorizations which not only keep from degrading aquatic ecological functions, but instead actually will enhance them. This way, in the long-term and in the broadest sense, the department will be able truly to ensure environmental protection on state-owned aquatic lands.

ENVIRONMENTAL PROTECTION: LEASES

Discussion on environmental protection: leases

The department's goal is to maintain, protect, and restore the environmental integrity of state-owned aquatic lands. Leases and other use authorizations can be tools to assure that activities that occur on state-owned aquatic lands are conducted in an environmentally responsible manner. SEE ALSO: Use authorizations.

Ensuring environmental protection means that there sometimes will be cases when the department simply does not authorize uses of state-owned aquatic lands because those uses would cause unacceptable adverse environmental impacts. In all cases, proposed uses must cause the least possible impact to environmental resources before receiving authorization. The use authorization decision must include consideration of alternatives which do not involve state-owned aquatic lands at all. For example, even a proposed water-dependent small watercraft repair facility should be reviewed to see if it can be located on adjacent uplands — by lifting the boats from the water — and if thereby the discharge of paints, oil or other pollutants from the repair facility can be prevented from entering the water.

Protecting environmental resources will often require significant redesign or rethinking of a proposed use or development. Staff should not hesitate to require conditions in use authorizations when they are necessary to address environmental concerns. The department's primary obligation

is always to ensure environmental protection, not to ensure the convenience of any given applicant's use of state-owned aquatic lands.

During review of use authorization applications, the department must clearly understand and describe any remaining uncertainties and the severity of any environmental risks, financial risks from environmental issues, and related concerns. In particular, this review must address any potential for sediment contamination and resulting financial liability for cleanup. In all cases, the tenant is to remain liable for any environmental damages resulting from the tenant's or a sublessee's actions.

Furthermore, approving a proposal on environmental grounds is not equivalent to authorizing the use itself. The department must make a determination on whether the use is otherwise appropriate for state-owned aquatic lands, in general and for a given parcel, in addition to determining whether the environmental impacts it may cause are acceptable. Finally, any remaining adverse environmental impacts must be properly mitigated.

As much as possible, staff should be involved with the applicant in the early design of a proposed project, both before and after the permit process commences. Early involvement in project design may often be the best opportunity to avoid adverse environmental impacts to state-owned aquatic lands with the least conflict and contentiousness.

Environmental resources and ecological functions can be expected to thrive best without disturbance. Therefore, when significant uncertainty exists, the department will not authorize proposals with potential significant adverse environmental impacts until the uncertainty can be resolved. Staff should encourage those applicants who insist their proposal can be undertaken without adverse impacts to provide the department with the evidence attesting to that fact.

Whenever feasible and appropriate, the Division will prepare more precise, quantifiable standards for particular environmental issues – for example, to determine how much shading of the water will cause what degree of impacts on aquatic species living below. The principles of environmental protection described in this manual, however, are not dependent on quantification or extensive scientific study of each individual proposed use. Instead, they are to be implemented based on basic ecological principles, the best scientific information available at the time, and the judgement and common sense of the department's professional staff.

ENVIRONMENTAL PROTECTION: RISK ASSESSMENTS

Discussion on environmental protections: risk assessments

One way of approaching environmental concerns is to conduct an ecological risk assessment. An ecological risk assessment is a defined process that evaluates the likelihood that adverse ecological effects may occur or are occurring as a result of exposure to one or more stressors. Ecological risk assessment is used to systematically evaluate and organize data, information, assumptions and uncertainties to help understand and predict the relationships between stressors and ecological effects in a way that is useful for decision-making. An assessment may involve chemical, physical or biological stressors, and one stressor or many stressors may be considered.

A risk assessment process does not make management decisions, but it can accomplish four goals:

- Involve risk managers, risk assessors and stakeholders.
- Create an agreed-upon set of endpoints, management goals, and understanding of the ecosystem and its interactions.

- Address concerns about cumulative impacts.
- Communicate risk to the resource to decision-makers.

This type of assessment allows identification of high risk activities so that appropriate adaptive management can be devised to minimize risk. It also allows for examining various "what-if" trade-off scenarios between different activities. These assessments can be used to predict the likelihood of future adverse effects or evaluate the likelihood that effects are caused by past exposure to stressors.

The department must use all available means to reduce environmental risks from the uses of state-owned aquatic lands. The simplest means to do this can include:

- Gathering more information.
- Requiring appropriate studies (perhaps funded by the applicant).
- Shortening contract duration.
- Establishing contract re-opener clauses, such as coinciding with regulatory environmental reviews, in case of unforeseen environmental concerns.
- Requiring indemnification, insurance and bonding.
- Denying an application for use of state-owned aquatic lands, when environmental risks cannot be avoided in any other way.

The department will work to develop comprehensive methods and procedures for conducting appropriate ecological risk assessment. In the absence of detailed technical assistance, staff should apply their best professional judgement and err on the side of caution when considering use authorizations which may adversely affect the environment.

Exchanges and acquisitions

RCW 79.90.457: Authority to exchange state-owned tidelands and shorelands--Rules--Limitation.

The department of natural resources may exchange state-owned tidelands and shorelands with private and other public landowners if the exchange is in the public interest and will actively contribute to the public benefits established in RCW 79.90.455. The board of natural resources shall adopt rules which establish criteria for determining when a proposed exchange is in the public interest and actively contributes to the public benefits established in RCW 79.90.455. The department may not exchange state-owned harbor areas or waterways.

WAC 332-30-170: Tideland and shoreland exchange.

The department will use this rule when it considers exchanging tidelands or shorelands with private individuals or public entities pursuant to RCW 79.90.457. The department may exchange these aquatic lands if the exchange is in the public interest and will actively contribute to the public benefits established in RCW 79.90.455. Those benefits are: Encouraging direct public use and access; fostering water-dependent uses; ensuring environmental protection; utilizing renewable resources; and generating revenue in a manner consistent with these benefits. The department may not exchange state-owned harbor areas or waterways.

(1) Eligibility criteria. The department may consider exchanging ownership of tidelands or shorelands with private and other public landowners if the proposed exchange meets the eligibility criteria set forth in (a) and (b) of this subsection.

(a) The economic values of the parcels must be equal or the exchange must result in a net economic gain to the state. The economic value must be determined by a qualified independent appraiser and/or economist and accomplished through a methodology accepted by the department.

(b) The tidelands or shorelands to be conveyed into state ownership must abut navigable water.

(2) Evaluation criteria. Subject to available funding, the department will evaluate eligible proposed exchanges according to the following criteria. The department will give priority and preference to proposed exchanges which, in the department's judgment, are in the public interest by providing the greatest public benefits, the least negative impacts, and the most appropriate resolution of

other considerations, as set forth in (a), (b) and (c) of this subsection.

(a) The tidelands or shorelands to be conveyed into state ownership must have one or more of the following characteristics:

(i) Be or abut a critical and/or an essential habitat identified by the National Marine Fisheries Service, state natural resource management agency(s), and/or the United States Department of Fish and Wildlife;

(ii) Be or abut a critical area identified by jurisdictions under chapter 36.70A RCW;

(iii) Be an area beneficial to sediment transport and/or nearshore habitat function identified by the National Marine Fisheries Service, state natural resource management agency(s), and/or the United States Department of Fish and Wildlife;

(iv) Be actively used or abut a parcel used in the commercial production of food or fibre or other renewable resource production (for example, commercial grade beds of shellfish and aquaculture facilities);

(v) Abut a state or national wildlife refuge;

(vi) Abut an upland parcel with public upland ownership, easements, or some other formalized agreement that would allow direct public use of and access to the water;

(vii) Be actively used or abut parcel(s) actively used for water-dependent uses or allow for water dependent use;

(viii) Contain a historic or archaeological property listed on or eligible to be listed on the National Register of Historic Places; or

(ix) Generate or have the potential to generate higher revenues than the parcel being transferred out-of-state ownership in a manner consistent with the benefits listed in RCW 79.90.455.

(b) The proposed exchange must have beneficial or no negative impacts on:

(i) Navigation;

(ii) The diversity and health of the local environment including the production and utilization of renewable resources;

(iii) The quantity and quality of public access to the waterfront;

(iv) Treaty rights of federally recognized tribes. The department will solicit comments on a proposed exchange from affected tribes; and

(v) Hazardous waste and contaminated sediments liability issues.

(c) The following issues must also be considered:

(i) Consistency with plans and development guidelines of public ports, counties, cities and other local, state, and federal agencies;

(ii) The relative manageability of the tidelands or shorelands to be exchanged including, but not limited to, the effect of the exchange on management costs, liability and upland access, and the relative proximity of the tidelands or shorelands to be exchanged to other state-owned shorelands or tidelands; and

(iii) The cumulative impacts of similar exchanges on water dependent uses, nonrenewable and renewable natural resources, and total aquatic lands acreage managed by the department.

(3) Recommendation to the board of natural resources. The department will provide its recommendations to the board of natural resources in writing, addressing whether the exchange meets the criteria in this rule and the positive and negative impacts of the exchange on public benefits and resources. The department will provide copies of its recommendations to the proponent of the exchange. In general, an exchange should only be recommended by the department and approved by the board of natural resources when, in the department's and the board's judgment, the public benefits associated with the exchange outweigh the negative impacts or other diminution in public benefits.

Discussion on exchanges and acquisitions

The department is authorized to exchange state-owned tidelands and shorelands with private and public landowners if the exchange is in the public interest and actively will contribute to the public benefits of aquatic lands. However, the department cannot exchange state-owned aquatic lands within harbor areas or waterways, and cannot exchange bedlands.

The Board of Natural Resources must approve exchanges recommended by the department. The board adopted numerous criteria which must be met before tidelands or shorelands can be exchanged. The general goal with any exchange should be to ensure that the parcel of land coming into state ownership will provide greater public benefits and functions than the parcel leaving state ownership. An exchange which results in acquisition of land which enhances public access would be acceptable as long as the criteria listed above are met. For example, it would not be acceptable to dispose of shorelands which abut navigable waters in order to acquire shorelands which do not abut navigable waters, even if public access were significantly enhanced.

The bottom line is that exchanges of shorelands and tidelands have very specific and narrow criteria to meet, and any proposed exchange must meet this criteria to be considered by the board. Proposals from staff to exchange state-owned aquatic lands must be reviewed by the Region, Division, and Executive Management.

Land managers should be on the lookout for tideland and shoreland properties which are good possibilities for exchange or acquisition. Ideally, if someone inquires about exchanging for a particular piece of state-owned aquatic land, the department already should have ideas about lands it would be interested in receiving in exchange. The Division will receive suggestions and compile a list of aquatic lands that would make valuable additions to the public land base.

The department also is able to acquire aquatic lands as funds are available. Lands acquired should meet the same general criteria as lands to be received in exchange. In particular, land acquisitions may be valuable for gaining a key private parcel within a surrounding block of state-owned aquatic lands, making ecological connections through a watershed, protecting a critical natural area as an aquatic reserve, or ensuring public access.

Exotic species

Discussion on exotic species

There are at least 52 known non-native species in the saltwater and brackish water in Puget Sound. Non-native species have been known to profoundly affect ecosystems by disrupting food webs and displacing native species, although the effects of most introductions are not well understood. Because of a lack of natural predators or competitors, these species can spread rapidly. The highest profile exotic species in the aquatic environment are Spartina and green crabs.

The primary ways by which exotic species enter state waters are through shipping, aquaculture, research and aquaria industries. In shipping, for example, ships in foreign ports take on ballast water to replace lost weight. The ships then return to Washington and dump the ballast in state waters, potentially introducing planktonic larvae into the aquatic system.

As a result of accidental release from aquaculture projects, Atlantic salmon are thought to be reproducing in the wild in British Columbia. The potential threat is that they will compete with wild stocks. For this reason, when authorizing net pens the department must ensure that adequate control mechanisms are in place to minimize release of Atlantic salmon. SEE ALSO: Aquaculture.

Research and control efforts tend to focus on the more obvious exotic species, such as Spartina and green crab, rather than on small organisms like amphipods whose effects are more subtle. But amphipods are a major food source for salmon and other species, so shifts in their populations could dramatically alter the food web and possibly lead to a collapse in the ecosystem. Management of exotic species must focus on practices that prevent or minimize introduction of new species. It is very expensive, and often not possible, to eradicate non-native species once they are established.

EXOTIC SPECIES: EUROPEAN GREEN CRAB

Discussion on exotic species: European green crab

European green crabs are found in saltwater. They eat juvenile clams, oysters and Dungeness crabs, and pose a significant threat to shellfish aquaculture. They spread quickly and widely and out-compete other crabs. European green crabs have now been found in Willapa Bay and Grays Harbor, and are suspected to be elsewhere in Washington. If green crabs become firmly established in Washington, they may have a significant impact on the state's clam and oyster culture industries, as well as the commercially important Dungeness crab fishery.

EXOTIC SPECIES: SPARTINA

Discussion on exotic species: Spartina

Spartina is a large grass which grows in saltwater tide flats and estuaries. It was intentionally introduced to Washington's northern Puget Sound waters to stabilize mudflats for agriculture and for waterfowl. Another variety of Spartina was accidentally introduced in oyster packing material in Willapa Bay around the turn of the century. Spartina is native to the east coast, but has become established along parts of the Pacific coastline, especially in Willapa Bay where it is an aggressive and dominant plant.

Spartina grows in mud, sand and cobble where tides move in and out each day, and where little or no competing vegetation normally grows. As the seedlings develop into circular patches, known as "clones," they stabilize silt moved by tidal action. This raises the clones' elevation above the adjacent tideflat. As clones grow and merge, the amount of silt collected is enough to change the site into a high meadow. This process eliminates native eelgrass and highly productive tideflats, destroying habitat for shore birds and wading birds, waterfowl, fish and other wildlife.

The department has a substantial program for Spartina control, operated by the Division. This program conducts physical removal of Spartina plants and research on biological controls.

F

Fees

For sales fees, SEE: Sales.
For application fees, SEE: Use authorizations
For rental fees, SEE: Rent.
For use and occupancy fee, SEE: Unauthorized uses.

Fill

RCW 79.90.480: Determination of annual rent rates for lease of aquatic lands for water-dependent uses--Marina leases.

(6) The annual rent for filled state-owned aquatic lands that have the characteristics of uplands shall be determined in accordance with RCW 79.90.500 in those cases in which the state owns the fill and has a right to charge for the fill.

RCW 79.90.515: Aquatic lands--Rent for improvements.

Except as agreed between the department and the lessee prior to construction of the improvements, rent shall not be charged under any lease of state-owned aquatic lands for improvements, including fills, authorized by the department or installed by the lessee or its predecessor before June 1, 1971, so long as the lands remain under a lease or succession of leases without a period of three years in which no lease is in effect or a bona fide application for a lease is pending. If improvements were installed under a good faith belief that a state aquatic lands lease was not necessary, rent shall not be charged for the improvements if, within ninety days after specific written notification by the department that a lease is required, the owner either applies for a

lease or files suit to determine if a lease is required. [1984 c 221 § 14.]

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(16) Filling on second class tidelands or shorelands will not be permitted except when in the public interest.
(17) When permitted, any fill on these aquatic lands must be stabilized to prevent washout into the marine environment.
(18) Material from aquatic lands will not be used for stream bank stabilization and revetments except when in the public interest.

WAC 332-30-139: Marinas and moorages.

(1) Moorage facilities developed on aquatic lands should meet the following design criteria:

(h) The use of floating breakwaters shall be considered as protective structures before using solid fills.

Discussion on fill

The general terms and conditions for leases that involve areas of filled aquatic land or areas planned for fill are the same as for other uses of aquatic lands. When the applicant owns or intends to install fill, that fill is generally treated as an improvement (in the sense of a structure, not a betterment). SEE ALSO: Use authorizations; Improvements.

However, because filling eliminates the aquatic characteristics of the land, the department generally discourages this particular improvement. Staff must give greater attention to the possible adverse impacts of a fill than for most improvements or use authorizations. In particular, the analysis of the proposal should consider how the fill will alter the quantity, quality, and distribution of aquatic habitat.

Fill is often used in the disposal of contaminated sediments, by either covering contaminated sediments with clean fill or by using these sediments as fill that is then paved to create uplands. Before the department approves a project involving the filling of aquatic lands, the proponent should be asked to justify why their fill project is consistent with and furthers the

department's stewardship responsibilities and statutory requirements. Historical records can sometimes shed light on the quality and source of the fill material, although the habitat impacts of older fills are probably not on record. SEE ALSO: Sediments.

For those areas of state-owned aquatic lands already filled, a challenge arises when determining the ownership and composition of the fill itself. Unless agreed between the department and the lessee prior to construction, rent will not be charged on any lease of state-owned aquatic lands for improvements, including fill, authorized by the department or placed on the leasehold by the lessee or its predecessor before June 1, 1971. This exemption from paying rent on improvements is in effect only if the land remains under lease or a succession of leases.

Based on this statute, the ownership of existing fill material on many aquatic lands remains with the lessee. In these cases, the value of the underlying aquatic land for rent purposes can be difficult to determine. Generally, filled areas have a higher market value and attract nonwater-dependent uses. The lessee may argue that most of the value is due to the fill, not the underlying land, and that the lessee should pay little rent for the land. The proper approach to valuing the aquatic land, however, is to establish the land's market value without the fill but with the right to add fill. The latter element, not the fill itself, may be the most economically valuable element. Therefore, the value of the land can be calculated by establishing the market value of the land and fill together and then subtracting the current cost of adding the fill. SEE ALSO: Valuation.

When the state owns the fill and has a right to charge rent for it, rent should be charged for the land and the fill in accordance with RCW 79.90.500, which means at full nonwater-dependent rates for both. SEE ALSO: Nonwater-dependent uses.

Flood control

SEE: Sediments.

G

Geoducks

RCW 79.96.080: Geoduck harvesting-Agreements, regulation.

(1) Geoducks shall be sold as valuable materials under the provisions of chapter 79.90 RCW. After confirmation of the sale, the department of natural resources may enter into an agreement with the purchaser for the harvesting of geoducks. The department of natural resources may place terms and conditions in the harvesting agreements as the department deems necessary. The department of natural resources may enforce the provisions of any harvesting agreement by suspending or canceling the harvesting agreement or through any other means contained in the harvesting agreement. Any geoduck harvester may terminate a harvesting agreement entered into pursuant to this subsection if actions of a governmental agency, beyond the control of the harvester, its agents, or its employees, prohibit harvesting, for a period exceeding thirty days during the term of the harvesting agreement, except as provided within the agreement. Upon such termination of the agreement by the harvester, the harvester shall be reimbursed by the department of natural resources for the cost paid to the department on the agreement, less the value of the harvest already accomplished by the harvester under the agreement.

(2) Harvesting agreements under this title for the purpose of harvesting geoducks shall require the harvester and the harvester's agent or representatives to comply with all applicable commercial diving safety standards and regulations promulgated and implemented by the federal occupational safety and health administration established under the federal occupational safety and health act of 1970 as such law exists or as hereafter amended (84 Stat. 1590 et seq.; 29 U.S.C. Sec. 651 et seq.):

PROVIDED, That for the purposes of this section and RCW 75.24.100 as now or hereafter amended, all persons who dive for geoducks are deemed to be employees as defined by the federal occupational safety and health act. All harvesting agreements shall provide that failure to comply with these standards is cause for suspension or cancellation of the harvesting agreement: PROVIDED FURTHER, That for the purposes of this subsection if the harvester contracts with another person or entity for the harvesting of geoducks, the harvesting agreement shall not be suspended or canceled if the harvester terminates its business relationship with such entity until compliance with this subsection is secured.

RCW 79.96.085: Geoduck harvesting--Designation of aquatic lands.

The department of natural resources shall designate the areas of aquatic lands owned by the state that are available for geoduck harvesting by licensed geoduck harvesters in accordance with chapter 79.90 RCW.

RCW 75.24.100: Geoduck clams, commercial harvesting--Unauthorized acts--Gear requirements.

[In this RCW, “department” refers to the Department of Fish and Wildlife.]

(1) The department may not authorize a person to take geoduck clams for commercial purposes outside the harvest area designated in a current department of natural resources geoduck harvesting agreement issued under RCW 79.96.080. The department may not authorize commercial harvest of geoduck clams from bottoms that are shallower than eighteen feet below mean lower low water (0.0. ft.), or that lie in an area bounded by the line of ordinary high tide (mean high tide) and a line two hundred yards seaward from and parallel to the line of ordinary high tide. This section does not apply to the harvest of private sector cultured aquatic products as defined in RCW 15.85.020.

(2) Commercial geoduck harvesting shall be done with a hand-held, manually operated water jet or suction device guided and controlled from under water by a diver. Periodically, the commission shall determine the effect of each type or unit of gear upon the geoduck population or the substrate they inhabit. The commission may require modification of the gear or stop its use if

it is being operated in a wasteful or destructive manner or if its operation may cause permanent damage to the bottom or adjacent shellfish populations.

RCW 75.30.280: Geoduck fishery license--Conditions and limitations--OSHA regulations--Violations.

[In this RCW, “department” refers to the Department of Fish and Wildlife.]

(1) A person shall not harvest geoduck clams commercially without a geoduck fishery license. This section does not apply to the harvest of private sector cultured aquatic products as defined in RCW 15.85.020.

(2) Only a person who has entered into a geoduck harvesting agreement with the department of natural resources under RCW 79.96.080 may hold a geoduck fishery license.

(3) A geoduck fishery license authorizes no taking of geoducks outside the boundaries of the public lands designated in the underlying harvesting agreement, or beyond the harvest ceiling set in the underlying harvesting agreement.

(4) A geoduck fishery license expires when the underlying geoduck harvesting agreement terminates.

(5) The director shall determine the number of geoduck fishery licenses that may be issued for each geoduck harvesting agreement, the number of units of gear whose use the license authorizes, and the type of gear that may be used, subject to RCW 75.24.100. In making those determinations, the director shall seek to conserve the geoduck resource and prevent damage to its habitat.

(6) The holder of a geoduck fishery license and the holder's agents and representatives shall comply with all applicable commercial diving safety regulations adopted by the federal occupational safety and health administration established under the federal occupational safety and health act of 1970 as such law exists on May 8, 1979, 84 Stat. 1590 et seq.; 29 U.S.C. Sec. 651 et seq. A violation of those regulations is a violation of this subsection. For the purposes of this section, persons who dive for geoducks are "employees" as defined by the federal occupational safety and health act. A violation of this subsection is grounds for suspension or revocation of a geoduck fishery license following a hearing under the procedures of chapter 34.05 RCW. The department shall not suspend or revoke a geoduck fishery license if the

violation has been corrected within ten days of the date the license holder receives written notice of the violation. If there is a substantial probability that a violation of the commercial diving standards could result in death or serious physical harm to a person engaged in harvesting geoduck clams, the department shall suspend the license immediately until the violation has been corrected. If the license holder is not the operator of the harvest vessel and has contracted with another person for the harvesting of geoducks, the department shall not suspend or revoke the license if the license holder terminates its business relationship with that person until compliance with this subsection is secured.

Discussion on geoducks

Geoducks are one of the most valuable aquatic resources owned by the people of Washington. Almost all geoducks harvested commercially come from state-owned aquatic lands. The revenue generated by the sale of geoducks pays for managing and protecting state aquatic resources and helps pay for public aquatic-related projects through grants from the Aquatic Lands Enhancement Account. SEE ALSO: Aquatic Lands Enhancement Account.

The geoduck program is primarily operated by the Division. Region staff should be aware of how the program works, however, so they may respond to public questions and concerns and so that they remember to consider the effects of land-management decisions on geoducks.

Geoduck harvesting is not considered aquaculture. SEE ALSO: Aquaculture.

Commercial harvesting of geoducks began in 1970. Initially, there was little demand for geoducks, and there was limited monitoring of commercial harvest activity. As the industry found a market for the geoducks in Asian countries, the prices increased but state supervision was still limited. Eventually, widespread poaching and under-reporting of harvests were discovered, which led to increased monitoring. As a result, the department greatly increased the oversight of geoduck sales and harvesting.

The goals for management of the state's geoduck program include:

- Protecting the geoduck resource and the marine environment.
- Encouraging a stable fishery.
- Maximizing benefits to the citizens of the state.
- Avoiding adverse impacts to shoreline areas.
- Using effective enforcement.

Cooperation with other agencies, the tribes and the public are critical to the department's geoduck activities. The department works closely with the Washington State Department of Fish and Wildlife (WDFW) to manage the geoduck resource. Before leasing any tracts for harvest, both agencies work together to solicit comments from other agencies and from the public, coordinate activities with other agencies, and provide environmental assessment and review.

As part of an extensive public contact program, the department meets with numerous interested parties to review the proposed harvest tracts and address any environmental or use conflicts prior to auctioning any geoduck harvest tracts. Interested parties include local officials, federal or state agencies, commanders of nearby military installations, and tribes with regulatory, proprietary, or operational interests in or near the proposed harvest areas.

Once the beds are surveyed and evaluated, environmental summaries of the tracts are distributed to the interested parties. The department, sometimes in conjunction with WDFW, then holds a public meeting near the proposed harvest to:

- Explain the fishery.
- Review the status of the geoduck resource.
- Describe the harvest operation and potential environmental impacts.
- Explain what residents may expect during the harvest.

- Allow the public the opportunity to voice their concerns about the harvest and suggest actions for minimizing adverse impacts.

GEODUCKS: BED HEALTH CERTIFICATION

Discussion on geoducks: bed health certification

Geoduck beds must be certified as meeting state and national sanitary requirements by the Washington Department of Health before they can be harvested.

It is the policy of the Office of Shellfish Programs at the Department of Health that all commercial shellfish areas be classified as to their suitability for shellfish harvesting on the basis of sanitary quality and public health safety in accordance with the National Shellfish Sanitation Program (NSSP). This classification policy is intended to ensure that shellfish areas approved for direct harvest are not subject to contamination from human or animal fecal matter, or poisonous or deleterious substances in amounts that may present an actual or potential hazard to public health.

The NSSP criteria for classifying a shellfish area consists of a shoreline survey, an evaluation of the area's physical characteristics, and a water quality evaluation.

The shoreline survey determines if there are any actual or potential pollution sources capable of affecting the shellfish area. Point and non-point pollution sources are identified and their proximity to the growing area is determined. The shoreline survey also determines if there are sporadic, seasonal or periodic pollution events and whether these events are sufficient to require a "Conditionally Approved,"

"Restricted" or "Prohibited" classification for all or some portion of the proposed area.

Evaluating the physical characteristics of a shellfish area involves determining the effects that weather, surface waters, and geographic factors have on the transport, distribution, and dilution of pollutants. A water quality evaluation of the shellfish area examines the results of collected water samples to determine any actual or potential pollution sources and conditions.

The Department of Health may close shellfish beds that do not meet sanitation standards.

GEODUCKS: ENVIRONMENTAL IMPACTS

Discussion on geoducks: environmental impacts

The department and WDFW have concluded that there are no significant long-term adverse impacts from geoduck harvest on the marine environment when the harvest is conducted as prescribed in The Puget Sound Commercial Geoduck Fishery Management Plan and Environmental Impact Statement (May, 1985). The division is currently preparing an updated management plan and environmental impact statement.

The major concerns expressed about geoduck harvest come from residents living near harvest sites, including noise and commotion during harvest, interference with other uses of the water (primarily recreational boating and visual use), trespass by harvesters on private tidelands, and possible reductions in intertidal geoduck stocks.

GEODUCKS: HARVESTING

Discussion on geoducks: harvesting

Commercial geoduck harvest occurs in an area starting at a water depth of 18 feet or a line 200 yards seaward from and parallel to the line of ordinary high tide, whichever is farthest from shore. The outer edge of the harvest area is at a depth of 70 feet. The inner harvest boundary minimizes harvest impacts to sensitive nearshore habitats, such as eelgrass beds, and to uses of the uplands. The outer boundary is the limit at which divers can effectively operate without extensive decompression.

The sustainable harvest is set annually by the department in consultation with the Washington Department of Fish and Wildlife (WDFW). The sustainable harvest level sets the percentage of the total geoduck resource that can be harvested on a regular basis without depleting the resource. In 1998, it was determined that 2.7 percent of the total geoducks could be harvested without significant impact to the total resource. This percentage is divided equally between state and tribal fisheries.

To determine how many geoducks can be harvested from a particular tract, the department completes preliminary dives and maps the bed sites. WDFW conducts transects, which are lines 150 feet long by 6 feet wide, counts the geoducks in these transects and estimates how many are present in the bed. From that estimate they can determine how many pounds of geoducks can be harvested from a given bed.

Geoducks are slow to recruit, which means that it takes a long time to replace the geoducks taken by harvest. Once a bed is fully harvested, it must be left to recover for an extended period of time, usually 20-30 years.

The department, working with WDFW, strives to meet the following criteria when selecting geoduck beds for harvest:

- Find beds that provide sufficient stocks to meet the optimum sustainable yield.

- Rotate the harvest around Puget Sound to minimize the impacts of the fishery on the environment and shoreline communities, for ease of enforcement, and for the convenience of the industry.

- Cluster the harvest tracts, when possible, to concentrate the fishing activities in a single, discrete area to facilitate enforcement.

- Offer a variety of geoduck types and qualities during each contract period to meet current market demands.
- Where possible, locate shore landing areas to minimize interference with public use and to offer convenience for enforcement and the industry.

The department selects beds to be harvested from those designated as harvestable by WDFW. The agencies work closely to select beds to supply optimum yields of the type of product required by the markets.

Geoducks are graded according to color and size, using an informal grading system. The color of the geoduck depends on the composition of the substrate. For example, geoducks tend to be brown or black when iron is present. Different markets prefer different colors and sizes, but the quality or taste is not affected. Generally, though, large geoducks with light-colored meat are considered the most desirable.

The department schedules and supervises an on-site test harvest with interested bidders before it auctions rights to harvest. The test harvest provides independent confirmation to the potential bidders of the quality and quantity of geoducks in the harvest area. The test harvests last one day per bed and each potential bidder can remove less than 500 pounds of geoducks, which must be paid for at the time of the test.

The department and WDFW work cooperatively to monitor the harvest of the state's portion of the geoduck harvest. A compliance boat monitors activities at the site to make sure that commercial geoduck harvest vessels comply with noise, safety, and operating requirements. All geoducks harvested under state contracts are weighed on the water each day. Divers check the condition of the geoduck beds several times a week to look for problems such as improper harvesting methods, waste, and illegal removal of geoducks. This monitoring is designed to protect the geoduck resource and minimize any inconvenience or disruption to neighboring landowners.

As part of harvest enforcement, the department ensures that:

- A compliance boat monitors activities at the harvest site.

- Commercial geoduck harvest vessels comply with noise, safety, and operating requirements.

- All geoducks harvested under state contracts are weighed on the water each day.

- Divers check the condition of the geoduck beds several times a week to look for improper harvesting methods, waste, illegal removal of geoducks, or other problems.

Responsibility for monitoring and compliance of the geoduck harvest program lies with the division. Each year a specific area of state-owned bedlands are identified for harvest of geoducks. Any harvest outside of these boundaries, unless by tribal entities, is illegal and should be immediately reported to the Division and the Washington Department of Fish and Wildlife.

People wishing to harvest geoducks on state-owned aquatic lands for recreation or personal consumption can obtain a personal use shellfish license from WDFW. They are required to observe the limits set by WDFW and are allowed to use only hand-digging methods.

GEODUCKS: OPERATIONS

Discussion on geoducks: operations

As a precondition to confirmation as a responsible bidder, the geoduck purchaser must have a Plan of Operation form approved by the department, which includes the following information:

- Source and identity of divers, vessel operators, tenders, packers, shippers, harvest vessels and other harvest equipment.
- Legal relationship between the purchaser, divers, vessel operators and tenders.
- The identity of any other subcontractors the purchaser will use.
- Location and moorage site of the vessels.
- Steps the purchaser will take to ensure compliance with the contract.

The purchaser also agrees to cooperate fully with any employee of the department, the Department of Fish and Wildlife, the Department of Health, the Washington Industrial Safety and Health Administration (WISHA) and Office of Safety and Health Administration (OSHA).

GEODUCKS: TRIBAL RELATIONS

Discussion on geoducks: tribal relations

The management of shellfish in the state of Washington, including geoducks, is subject to treaties with the various tribes. In 1995, Federal Court Judge Rafeedie issued a ruling declaring that geoduck and shellfish are "fish" and thus the

tribes have treaty rights to share these resources with all citizens of the state. This means that up to fifty percent of the resources allowed to be harvested in any given year can be harvested by the tribes. The department works cooperatively with the tribes to set geoduck harvests.

This sharing of the geoduck resource requires, for example, that if the sustainable harvest is set at 2.7 percent of the total weight of geoducks in harvestable beds (as it was in 1998), the state and the tribes are each entitled to harvest 1.35 percent.

The geoduck fishery and its management are described in annual management agreements and harvest plans negotiated and signed by the state and tribes. Separate management agreements and harvest plans are written for each of the six management regions. Each tribe may fish in its usual and accustomed area as determined through intertribal agreements.

These management agreements specify:

- The catch areas open for harvest.
- The type of fishery to be opened (commercial or non-commercial).
- The species to be taken, including an estimate of, or upper limit on, the amount to be taken.
- The gear to be allowed.
- Provisions for record keeping and harvest reporting, including a schedule to ensure a timely exchange of information.
- Any other information necessary for a specific fishery.

If the department and the involved tribe cannot come to a resolution in the Tribal Management Agreement, or if either is reluctant to sign, the fishery may be opened by a procedure set forth in the Rafeedie Decision called “Opening a Fishery Without Agreement.” In these cases:

- The state and all affected tribes confer at least one time in an effort to reach agreement regarding the proposed fishery.

- Failing agreement, the tribes or state proposing to open the fishery provide a proposed regulation for the fishery, in writing, at least 14 days before the fishery is scheduled to begin.

- The party proposing the harvest provides a sound fisheries management basis for determining that a harvestable surplus exists and that a fishery can be operated that will not interfere with the sharing principles ordered by the court.

Tribes monitor their own harvests, and are required to follow Department of Health regulations as well as regulations that protect eelgrass, herring and salmon. The department is not mandated to monitor tribal geoduck harvests, though the department can conduct an investigation if it is believed violations have occurred.

Gravel

SEE: Sand and gravel.

Growth Management Act

Discussion on Growth Management Act

The state Growth Management Act (GMA) requires certain cities and counties that meet population or growth criteria to plan for future growth while protecting natural resources. Other cities and counties may, at their option, participate in planning under the act. Under GMA, all jurisdictions must classify and designate natural resource lands (e.g., forest, agricultural) and critical areas (e.g., wetlands, fish and

wildlife habitat, steep slopes). These jurisdictions must also adopt development regulations such as zoning and other land use controls, and comprehensive plans.

Regarding growth management issues, department staff should:

- Read and be familiar with all local comprehensive plans and zoning codes that pertain to state-owned aquatic lands in their assigned area.

- Be aware of proposed amendments to local comprehensive plans and zoning codes.

- Work with local planning agencies to determine if such amendments will affect state-owned aquatic lands. Consider if proposed changes will, for example, alter uses of uplands adjacent to state-owned aquatic lands or will result in greater impacts to state-owned aquatic lands due to greater density or newly permitted uses.

- Notify the Region growth management coordinator and the Division of upcoming proposed amendments and opportunities to comment on them.

SEE ALSO: Shoreline Management Act; Aquatic land use planning.

H

Habitat

SEE: Environmental protection.

Harbor areas

Washington State Constitution, Article XV, Harbors and Tide Waters

 # Section 1. Harbor Line Commission and Restraint on Disposition.
The legislature shall provide for the appointment of a commission whose duty is shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof on either side. Any harbor line so located or established may thereafter be changed, relocated or reestablished by the commission pursuant to such provision as may be made therefor by the legislature. The state shall never give, sell or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high water, and within not less than fifty feet nor more than two thousand feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

 # Section 2. Leasing and Maintenance of Wharves, Docks, Etc.
The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures, upon the areas mentioned in section one of this article, but no

lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such areas wharves, docks, and other structures.

 # Section 3. Extension of Streets Over Tide Lands.
Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.

RCW 79.90.020: "Harbor area."

Whenever used in chapters 79.90 through 79.96 RCW the term "harbor area" means the area of navigable waters determined as provided in section 1 of Article XV of the state Constitution, which shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce.

RCW 79.92.010: Harbor lines and areas to be established.

It shall be the duty of the board of natural resources acting as the harbor line commission to locate and establish harbor lines and determine harbor areas, as required by section 1 of Article XV of the state Constitution, where such harbor lines and harbor areas have not heretofore been located and established.

RCW 79.90.080: Board of natural resources--Records--Rules and regulations.

The board of natural resources acting as the harbor line commission shall keep a full and complete record of its proceedings relating to the establishment of harbor lines and the determination of harbor areas. The board shall have the power from time to time to make and enforce rules and regulations for the carrying out of the provisions of chapters 79.90 through 79.96 RCW relating to its duties not inconsistent with law.

RCW 79.90.015: "Outer harbor line."

Whenever used in chapters 79.90 through 79.96 RCW the term "outer harbor line" means a line located and established in navigable waters as provided in section 1 of Article XV of the state Constitution, beyond which the state shall never sell or lease any rights whatever to private persons.

RCW 79.90.025: "Inner harbor line."

Whenever used in chapters 79.90 through 79.96 RCW the term "inner harbor line" means a line located and established in navigable waters between the line of ordinary high tide or ordinary high water and the outer harbor line, constituting the inner boundary of the harbor area.

WAC 332-30-108: Establishment of new harbor areas.

(1) The policies and standards in this section apply to establishment of new harbor areas by the harbor line commission under Article XV of the Washington Constitution and to establishment of new harbor areas in Lake Washington by the commissioner of public lands under RCW 79.94.240.

(2) New harbor areas will only be established to serve the following purposes:

(a) Reserving adequate urban space for navigation and commerce facilities; and

(b) Preventing urban development from disrupting navigation.

(3) New harbor areas will only be established when a need is demonstrated by existing development or by plans, studies, project proposals or other evidence of development potential in, or waterward of, the proposed harbor area.

(4) Unless there is an overriding state-wide navigation and commerce need, new harbor areas will only be established when:

(a) Compatible with local land use and shoreline management plans;

(b) Supported by the city, county and port district;

(c) The area is physically and environmentally suitable for navigation and commerce purposes; and

(d) Necessary support facilities and services are likely to be available.

(5) The shoreline length of a new harbor area established along a city's waterfront will be determined by the need and purposes to be served and by conformance with subsection (4) of this section.

(6) Harbor line placement standards.

(a) Harbor lines will be placed to serve constitutional harbor area purposes as they relate to the individual site in question.

(b) Harbor lines will be placed to provide practical development guidance. Harbor lines will relate to navigation and commerce

development which has occurred or can reasonably be expected to occur.

(c) Inner harbor lines will be placed at the boundary of public aquatic land ownership. Inner harbor lines may be placed waterward of the boundary of public ownership to avoid conflicts with other guidelines in this section.

(d) Outer harbor lines will generally be placed near the ends of existing conforming structures located on public aquatic lands. The lines shall provide adequate space for navigation and commerce and prevent development from interfering with navigation.

(e) Unless there is an overriding state-wide navigation and commerce need, harbor lines will be placed in accordance with:

(i) Local, state and federal land use plans and environmental regulations;

(ii) Maintenance of environmental quality;

(iii) Existing abutting harbor lines; and

(iv) Existing aquatic land development.

Discussion on harbor areas

Harbor areas are specially designated areas of aquatic lands in front of and near the waterfronts of incorporated cities. According to Article XV of the state Constitution, harbor areas “shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.”

The state Constitution requires the Legislature to appoint a commission to establish Harbor areas. The Legislature has designated the Board of Natural Resources to act as the Harbor Line Commission. The Commission convenes to consider proposals regarding changes to harbor areas, including establishing, relocating or re-establishing inner and outer harbor lines. The Commission has established 31 harbor areas – 26 tidal (marine) and five non-tidal (river or lake) – totaling about 700 acres.

Harbor areas extend along the shoreline to one mile outside the city limits. Inner harbor lines are in navigable waters

between the line of mean high tide or ordinary high water and the outer harbor line, and make up the inner boundary of the harbor area. Outer harbor lines are not less than 50 feet and not more than 2,000 feet from the inner harbor line.

Unlike first and second class tidelands and shorelands, the designation of a harbor area does not change as city limits change, but instead can only be changed by the Commission. Harbor line relocations must maintain or enhance the type and amount of harbor area needed to meet long-term needs of water-dependent commerce and must maintain adequate space for navigational use beyond the outer harbor line.

Designated harbor areas of the state are:

Aberdeen
Anacortes
Bellingham
Blaine
Bremerton
Charleston
Cosmopolis
Edmonds
Everett
Gig Harbor
Hoquiam
Ilwaco
Kalama
Kennewick*
La Conner
Lake Union
Lake Washington*
Lake Whatcom*
Marysville
Olympia
Pasco*
Port Angeles
Port Orchard
Port Townsend
Poulsbo
Seattle
Shelton
Snohomish
Steilacoom
Tacoma
Vancouver

* indicates those harbors where only the line of navigability has been designated.

HARBOR AREAS: RELOCATIONS

RCW 79.92.020: Relocation of harbor lines by the harbor line commission.

Whenever it appears that the inner harbor line of any harbor area heretofore determined has been so established as to overlap or fall inside the government meander line, or for any other good cause, the board of natural resources acting as the harbor line commission is empowered to relocate and reestablish said inner harbor line so erroneously established, outside of the meander line. All tidelands or shorelands within said inner harbor line so reestablished and relocated, shall belong to the state and may be sold or leased as other tidelands or shorelands of the first class in accordance with the provisions of RCW 79.94.150: PROVIDED, That in all other cases, authority to relocate the inner harbor line or outer harbor line, or both, shall first be obtained from the legislature.

RCW 79.92.030: Relocation of harbor lines authorized by legislature.

The commission on harbor lines is hereby authorized to change, relocate, or reestablish harbor lines in Guemes Channel and Fidalgo Bay in front of the city of Anacortes, Skagit county; in Grays Harbor in front of the cities of Aberdeen, Hoquiam, and Cosmopolis, Grays Harbor county; Bellingham Bay in front of the city of Bellingham, Whatcom county; in Elliott Bay, Puget Sound and Lake Union within, and in front of the city of Seattle, King county, and within one mile of the limits of such city; Port Angeles harbor in front of the city of Port Angeles, Clallam county; in Lake Washington in front of the cities of Renton and Lake Forest Park, King county; Commencement Bay in front of the city of Tacoma, Pierce county; and within one mile of the limits of such city; Budd Inlet in front of the city of Olympia, Thurston county; the Columbia river in front of the city of Kalama, Cowlitz county; Port Washington Narrows and Sinclair Inlet in front of the city of Bremerton, Kitsap county; Sinclair Inlet in front of the city of Port Orchard, Kitsap county; in Liberty Bay in front of the city of Poulsbo, King county; the Columbia river in front of the city of Vancouver, Clark county; Port Townsend Bay in front of the city of Port Townsend, Jefferson county; the Swinomish Channel in front of the city of La Conner, Skagit county; and Port Gardner Bay in front of the city of Everett, Snohomish county, except no harbor lines shall be established west of the easterly shoreline of Jetty

Island as presently situated or west of a line extending S 37° 09' 38" W from the Snohomish River Light (5); in Oakland Bay in front of the city of Shelton, Mason county; and within one mile of the limits of such city; in Gig Harbor in front of the city of Gig Harbor, Pierce county; and within one mile of the limits of such city.

RCW 79.92.035: Modification of harbor lines in Port Gardner Bay.

The harbor line commission shall modify harbor lines in Port Gardner Bay as necessary to facilitate the conveyance through exchange authorized in RCW 79.94.450.

WAC 332-30-116 Harbor line relocation.

Harbor areas are established to meet the needs of navigation and commerce. Harbor line relocations must be consistent with this purpose.

(1) Harbor line relocations should:

(a) Maintain or enhance the type and amount of harbor area needed to meet long-term needs of water dependent commerce; and

(b) Maintain adequate space for navigation beyond the outer harbor line.

(2) When in agreement with the above guidelines, consideration of harbor line relocations should include:

(a) Plans and development guidelines of public ports, counties, cities, and other local, state, and federal agencies;

(b) Economic and environmental impacts;

(c) Public access to the waterfront;

(d) Indian treaty rights;

(e) Cumulative impacts of similar relocations on water-dependent commerce; and

(f) The precedent setting effect on other harbor areas.

(3) Procedure.

(a) Upon receipt of a completed harbor line relocation proposal form and SEPA checklist (if necessary), department of natural resources staff shall arrange for a public hearing.

(b) Notice of the hearing shall be mailed at least thirty days in advance to the concerned city, county, port district, interest groups, adjacent tide, shore or upland owners and others who

indicate interest; and shall be published at least twenty days in advance in a local newspaper of general circulation.

(c) The hearing, conducted by a hearings officer, shall be held in the county in which the relocation is proposed. Department staff shall present the proposal and preliminary recommendations. The hearing shall be recorded.

(d) Comments may be submitted at the hearing or mailed to the department. Written comments must be postmarked no later than fourteen days after the hearing.

(e) Department of natural resources staff will finalize SEPA compliance (if necessary) and prepare a final report of recommendations to the harbor line commission.

(f) No later than sixty days after the date of the public hearing, the harbor line commission shall consider the staff report and public comments, then approve, modify or deny the relocation. A copy of the commission's resolution shall be sent within ten days to the proponent, the city, county, port district and other parties who have requested it.

HARBOR AREAS: USES AND LEASES

RCW 79.92.060: Terms of harbor area leases.

Applications, leases, and bonds of lessees shall be in such form as the department of natural resources shall prescribe. Every lease shall provide that the rental shall be payable to the department, and for cancellation by the department upon sixty days' written notice for any breach of the conditions thereof. Every lessee shall furnish a bond, with surety satisfactory to the department, with such penalty as the department may prescribe, but not less than five hundred dollars, conditioned upon the faithful performance of the terms of the lease and the payment of the rent when due. If the department shall at any time deem any bond insufficient, it may require the lessee to file a new and sufficient bond within thirty days after receiving notice to do so. Applications for leases of harbor areas upon tidal waters shall be accompanied by such plans and drawings and other data concerning the proposed wharves, docks, or other structures or improvements thereof as the department shall require. Every lease of harbor areas shall provide that, wharves, docks, or other conveniences of navigation and commerce adequate for the public needs, to be

specified in such lease, shall be constructed within such time as may be fixed in each case by the department. In no case shall the construction be commenced more than two years from the date of such lease and shall be completed within such reasonable time as the department shall fix, any of which times may be extended by the department either before or after their expiration, and the character of the improvements may be changed either before or after completion with the approval of the department: PROVIDED, That if in its opinion improvements existing upon such harbor area or the tidelands adjacent thereto are adequate for public needs of commerce and navigation, the department shall require the maintenance of such existing improvements and need not require further improvements.

RCW 79.92.070: Construction or extension of docks, wharves, etc., in harbor areas-New lease.

If the owner of any harbor area lease upon tidal waters shall desire to construct thereon any wharf, dock, or other convenience of navigation or commerce, or to extend, enlarge, or substantially improve any existing structure used in connection with such harbor area, and shall deem the required expenditure not warranted by his right to occupy such harbor area during the remainder of the term of his lease, he may make application to the department of natural resources for a new lease of such harbor area for a period not exceeding thirty years. Upon the filing of such application accompanied by such proper plans, drawings or other data, the department shall forthwith investigate the same and if it shall determine that the proposed work or improvement is in the public interest and reasonably adequate for the public needs, it shall by order fix the terms and conditions and the rate of rental for such new lease, such rate of rental shall be a fixed percentage, during the term of such lease, on the true and fair value in money of such harbor area determined from time to time by the department as provided in *RCW 79.92.050. The department may propose modifications of the proposed wharf, dock, or other convenience or extensions, enlargements, or improvements thereon. The department shall, within ninety days from the filing of such application notify the applicant in writing of the terms and conditions upon which such new lease will be granted, and of the rental to be paid, and if the applicant shall within ninety days thereafter elect to accept a new lease of such

harbor area upon the terms and conditions, and at the rental prescribed by the department, the department shall make a new lease for such harbor area for the term applied for and the existing lease shall thereupon be surrendered and canceled. [Note: RCW 79.92.050 was repealed in 1984.]

RCW 79.92.080: Re-leases of harbor areas.

Upon the expiration of any harbor area lease upon tidal waters hereafter expiring, the owner thereof may apply for a re-lease of such harbor area for a period not exceeding thirty years. Such application shall be accompanied with maps showing the existing improvements upon such harbor area and the tidelands adjacent thereto and with proper plans, drawings, and other data showing any proposed extensions or improvements of existing structures. Upon the filing of such application the department of natural resources shall forthwith investigate the same and if it shall determine that the character of the wharves, docks or other conveniences of commerce and navigation are reasonably adequate for the public needs and in the public interest, it shall by order fix and determine the terms and conditions upon which such re-lease shall be granted and the rate of rental to be paid, which rate shall be a fixed percentage during the term of such lease on the true and fair value in money of such harbor area as determined from time to time by the department of natural resources in accordance with RCW 79.92.050. [Note: RCW 79.92.050 was repealed in 1984.]

RCW 79.92.090: Procedure to re-lease harbor areas.

Upon completion of the valuation of any tract of harbor area applied for under RCW 79.92.080, the department of natural resources shall notify the applicant of the terms and conditions upon which the re- lease will be granted and of the rental fixed. The applicant or his successor in interest shall have the option for the period of sixty days from the date of the service of notice in which to accept a lease on the terms and conditions and at the rental so fixed and determined by the department. If the terms and conditions and rental are accepted a new lease shall be granted for the term applied for. If the terms and conditions are not accepted by the applicant within the period of time, or within such further time, not exceeding three months, as the department shall grant, the same shall be deemed rejected by the applicant, and

the department shall give eight weeks' notice by publication once a week in one or more newspapers of general circulation in the county in which the harbor area is located, that a lease of the harbor area will be sold on such terms and conditions and at such rental, at a time and place specified in the notice (which shall not be more than three months from the date of the first publication of the notice) to the person offering at the public sale to pay the highest sum as a cash bonus at the time of sale of such lease. Notice of the sale shall be served upon the applicant at least six weeks prior to the date thereof. The person paying the highest sum as a cash bonus shall be entitled to lease the harbor area: PROVIDED, That if the lease is not sold at the public sale the department may at any time or times again fix the terms, conditions and rental, and again advertise the lease for sale as above provided and upon similar notice: AND PROVIDED FURTHER, That upon failure to secure any sale of the lease as above prescribed, the department may issue revocable leases without requirement of improvements for one year periods at a minimum rate of two percent.

RCW 79.92.100: Regulation of wharfage, dockage, and other tolls.

The state of Washington shall ever retain and does hereby reserve the right to regulate the rates of wharfage, dockage, and other tolls to be imposed by the lessee or his assigns upon commerce for any of the purposes for which the leased area may be used and the right to prevent extortion and discrimination in such use thereof.

WAC 332-30-109 Harbor area.

(1) Harbor areas shall be reserved for landings, wharves, streets and other conveniences of navigation and commerce.
(2) Water dependent commerce shall be given preference over other uses of harbor areas.
(3) Every consideration shall be given to meeting the expanding need for navigation and water dependent commerce in existing harbor areas.
(4) Several industries using the same harbor area facility shall be given preference over single industry use.

(5) Shallow draft uses, such as barge terminals and marinas, shall be preferred over deep draft uses, in areas requiring extensive maintenance dredging.
(6) Harbor lines may be adjusted, when authorized by the legislature, to provide reasonable opportunity to meet the present and future needs of commerce and navigation.
(7) In harbor areas where no current constitutional use (navigation and commerce) is called for or practical and other uses are in demand, interim uses may be authorized by the board of natural resources if in the public interest.
(8) The department will, where in the public interest, promote the conversion of existing nonconforming uses to conforming uses by assisting if possible, such users in resiting their operations and by withdrawing renewal options on affected state harbor area leases.
(9) The department will promote full development of all existing suitable harbor areas for use by water dependent commerce.
(10) Abandoned structures determined to be unsightly or unsafe by the department shall be removed from harbor areas by the owner of the structures upon demand by the department or by the department in which case the owner will be assessed the costs of such removal.
(11) Houseboats are not permitted in harbor areas.
(12) Resource management cost account portion of the revenue from leasing of harbor areas shall be used to reduce the general tax burden and for aquatic land management programs that are of benefit to the public.
(13) Harbor areas will be managed to produce revenue for the public unless withdrawn as a public place.
(14) Harbor area lease renewal applications must be returned to the department within sixty days of expiration of prior lease term. If not timely returned, the harbor area involved will be put up for public auction.
(15) The department will encourage local government, state and federal agencies to cooperate in planning for the following state-wide harbor management needs:

(a) Reserve adequate and appropriate space within the jurisdiction to serve foreseeable navigation and commerce development needs.

(b) Coordinate plans for aquatic land and upland development so that areas reserved for navigation and commerce will be usable in the future.

(c) Identify areas where interim uses may be allowed.
(d) Identify needed changes in harbor lines.
(e) Minimize the environmental impacts of navigation and commerce development.
(f) Prevent existing and future interim uses in harbor areas from lowering the suitability of harbor areas for navigation and commerce development.

WAC 332-30-115: Harbor area use classes.

These classes are based on the degree to which the use conforms to the intent of the constitution that designated harbor areas be reserved for landings, wharves, streets and other conveniences of navigation and commerce.

(1) Water-dependent commerce. Water-dependent commerce are all uses that cannot logically exist in any other location but on the water and are aids to navigation and commerce. These are preferred harbor area uses. Leases may be granted up to the maximum period allowed by the Constitution and may be renewed. Typical uses are:

(a) Public or private vessel terminal and transfer facilities which handle general commerce including the cargo handling facilities necessary for water oriented uses.
(b) Public and private terminal facilities for passenger vessels.
(c) Watercraft construction, repair, maintenance, servicing and dismantling.
(d) Marinas and mooring areas.
(e) Tug and barge companies facilities.
(f) Log booming.

(2) Water-oriented commerce. Water oriented commerce are commercial uses which historically have been dependent on waterfront locations, but with existing technology could be located away from the waterfront. Existing water-oriented uses may be asked to yield to water dependent commercial uses when the lease expires. New water-oriented commercial uses will be considered as interim uses. Typical uses are:

(a) Wood products manufacturing.
(b) Watercraft sales.
(c) Fish processing.
(d) Sand and gravel companies.
(e) Petroleum handling and processing plants.
(f) Log storage.

(3) Public access. Facilities for public access are lower priority uses which do not make an important contribution to navigation and commerce for which harbor areas are reserved, but which can be permitted providing that the harbor area involved is not needed, or is not suitable for water-dependent commerce. Leases may be issued for periods up to thirty years with possible renewals. Typical uses are:

(a) Public fishing piers.
(b) Public waterfront parks.
(c) Public use beaches.
(d) Aquariums available to the public.
(e) Underwater parks and reefs.
(f) Public viewing areas and walkways.

(4) Residential use. Residential uses include apartments, condominiums, houseboats, single and multifamily housing, motels, boatels and hotels. Residential uses do not require harbor area locations and are frequently incompatible with water-dependent commerce. New residential uses will not be permitted to locate in harbor areas. This restriction on new leases differentiates residential uses from interim uses. Existing residential uses may be asked to yield to other uses when the lease expires. Proposed renewals of residential leases will require the same analysis as specified for interim uses.

(5) Interim uses. Interim uses are all uses other than water-dependent commerce, existing water-oriented commerce, public access facilities, and residential uses. Interim uses do not require waterfront locations in order to properly function. Leases may only be issued and reissued for interim uses in exceptional circumstances and when compatible with water dependent commerce existing in or planned for the area. See WAC 332-30-137 Nonwater-dependent uses for evaluation standards.

(6) Areas withdrawn are harbor areas which are so located as to be currently unusable. These areas are temporarily withdrawn pending future demand for constitutional uses. No leases are issued.

Discussion on harbor areas: uses and leases

Leases in harbor areas are similar to use authorizations elsewhere, but also follow many unique rules, as described above. SEE ALSO: Use authorizations.

Most importantly, harbor areas are to be used primarily for navigation and commerce. To this end, land uses within harbor areas are ranked in order of their need for waterfront locations. Water-dependent commerce has the highest priority in harbor areas. This priority use includes:

- Public or private terminal and transfer facilities which handle general commerce.
- Public or private terminal facilities for passenger vessels.
- Watercraft construction, repair, and maintenance.
- Marinas and mooring areas.
- Tug and barge company facilities.
- Log booming.

Lower priority goes to existing water-oriented uses. New water-oriented uses and all nonwater-dependent uses are designated as interim uses and are the lowest priority for harbor areas.

New residential uses are not permitted to locate in harbor areas. Existing residential uses in harbor areas may be asked to yield to other uses when their leases expire. Renewal of residential uses in harbor areas will be issued only in exceptional circumstances, and only when compatible with water-dependent commerce existing in or planned for the area – the same standard as for other nonwater-dependent uses.

Because harbor areas are reserved primarily for navigation and commerce, public access uses, while permissible, are ranked below other water-dependent uses in harbor areas, though higher than residential and interim uses. This differs from the high priority normally given to public access uses on all other state-owned aquatic lands. Common public access uses in harbor areas include:

- Public waterfront parks.
- Public fishing piers.
- Public use beaches.
- Aquariums available to the public.

- Underwater parks and reefs.
- Public viewing areas and walkways.

Hold-over status

SEE: Use authorizations.

Houseboats

SEE: Residential uses.

Improvements

RCW 79.90.055: "Improvements."

Whenever used in chapters 79.90 through 79.96 RCW the term "improvements" when referring to aquatic lands means anything considered a fixture in law placed within, upon or attached to such lands that has changed the value of those lands, or any changes in the previous condition of the fixtures that changes the value of the land.

RCW 79.90.515: Aquatic lands--Rent for improvements.

Except as agreed between the department and the lessee prior to construction of the improvements, rent shall not be charged under any lease of state-owned aquatic lands for improvements, including fills, authorized by the department or installed by the lessee or its predecessor before June 1, 1971, so long as the lands remain under a lease or succession of leases without a period of three years in which no lease is in effect or a bona fide application for a lease is pending. If improvements were installed under a good faith belief that a state aquatic lands lease was not necessary, rent shall not be charged for the improvements if, within ninety days after specific written notification by the department that a lease is required, the owner either applies for a lease or files suit to determine if a lease is required. [1984 c 221 § 14.]

RCW 79.94.320: Tide or shore lands of the first or second class--Failure to re-lease tide or shore lands--Appraisal of improvements.

In case any lessee of tide or shore lands, for any purpose except mining of valuable minerals or coal, or extraction of petroleum or

gas, or his successor in interest, shall after the expiration of any lease, fail to purchase, when otherwise permitted under RCW 79.94.150 to be purchased, or re-lease from the state the tide or shore lands formerly covered by his lease, when the same are offered for sale or re-lease, then and in that event the department of natural resources shall appraise and determine the value of all improvements existing upon such tide or shore lands at the expiration of the lease which are not capable of removal without damage to the land, including the cost of filling and raising said property above high tide, or high water, whether filled or raised by the lessee or his successors in interest, or by virtue of any contract made with the state, and also including the then value to the land of all existing local improvements paid for by such lessee or his successors in interest. In case the lessee or his successor in interest is dissatisfied with the appraised value of such improvements as determined by the department, he shall have the right of appeal to the superior court of the county wherein said tide or shore lands are situated, within the time and according to the method prescribed in RCW 79.90.400 for taking appeals from decisions of the department. In case such tide or shore lands are leased, or sold, to any person other than such lessee or his successor in interest, within three years from the expiration of the former lease, the bid of such subsequent lessee or purchaser shall not be accepted until payment is made by such subsequent lessee or purchaser of the appraised value of the improvements as determined by the department, or as may be determined on appeal, to such former lessee or his successor in interest. In case such tide or shore lands are not leased, or sold, within three years after the expiration of such former lease, then in that event, such improvements existing on the lands at the time of any subsequent lease, shall belong to the state and be considered a part of the land, and shall be taken into consideration in appraising the value, or rental value, of the land and sold or leased with the land.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(13) Abandoned structures determined to be unsightly or unsafe by the department shall be removed from these aquatic lands by the owner of the structures upon demand by the department or by

the department in which case the owner will be assessed the costs of such removal.

WAC 332-30-122: Aquatic land use authorization.

All requirements in this section shall apply to the department. Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(4) Structures and improvements on aquatic lands.

(a) Authorization for placing structures and improvements on public aquatic lands shall be based on the intended use, other uses in the immediate area, and the effect on navigational rights of public and private aquatic land owners. Structures and improvements shall:

(i) Conform to the laws and regulations of any public authority;

(ii) Be kept in good condition and repair by the authorized user of the aquatic lands;

(iii) Not be, nor become, a hazard to navigation;

(iv) Be removed by the authorized user as stipulated in the authorization instrument.

(b) In addition to aquatic land rentals and fees, rent shall be charged for use of those structures and improvements:

(i) Owned by the department, under contract to the department for management; or that become state property under RCW 79.94.320;

(ii) As may be agreed upon as part of the authorization document;

(iii) Installed on an authorized area without written concurrence of the department; or

(iv) Not covered by an application for use of aquatic lands, or a lawsuit challenging such requirements, within ninety days after the date of mailing of the department's written notification of unauthorized occupancy of public aquatic lands.

(c) Only land rental and fees shall be charged for public aquatic lands occupied by those structures and improvements that are:

(i) Authorized in writing by the department;

(ii) Installed prior to June 1, 1971 (effective date of the Shoreline Management Act) on an area authorized for use from the department; or

(iii) Covered by an application for use of aquatic lands within ninety days after the date of mailing of the department's written notification of unauthorized occupancy of public aquatic lands.

Discussion on improvements

Authorization for placement of new physical improvements on state-owned aquatic lands should be evaluated carefully to avoid additional risks and impacts to the state, including environmental and navigational concerns. The state may be liable for claims arising from the use of abandoned or unauthorized physical improvements placed on state-owned aquatic lands. The department requires financial assurance to guarantee payment of rent and removal of all improvements from the lease area. This can be a bond, and must be twice the annual rent plus the estimated cost of removing the improvements.

When a lessee fails to re-lease tidelands or shorelands, or when the department determines it is not in the best interests of the state to re-lease the previously leased tidelands or shorelands, the department must appraise the value of all improvements to the land, including fill. If the lands are subsequently leased to a new lessee within three years, the new lessee must pay the previous lessee for the value of the improvements. If the lands are not subsequently leased for three years, the improvements will belong to the state. SEE ALSO: Use authorizations.

Fill is one form of improvement that requires special attention to the impacts to aquatic lands. SEE ALSO: Fill.

Industrial uses

SEE: Commercial and industrial uses.

Interest rates

RCW 79.90.535: Aquatic lands--Interest rate.
The interest rate and all interest rate guidelines shall be fixed, from time to time, by rule adopted by the board of natural resources and shall not be less than six percent per annum.

WAC 332-30-106 Definitions.
(29) "Interest rate" shall be twelve percent per annum (RCW 79.90.520).

L

Leases

SEE: Use authorizations.

Linear projects

Discussion on linear projects

Linear projects are communication, utility, or transportation facilities extending in a line between two points, including projects such as roads, railroads, bridges, natural gas or oil pipelines, water and sewer lines, outfalls and various communications cables. Linear projects may require special attention from the department because of their projected life, the high economic and public values often associated with them, their potential for environmental impacts, and their potential to cross aquatic lands numerous times. SEE ALSO: Bridges and roads; Utility lines; Outfalls.

A linear project is virtually always a nonwater-dependent use of state-owned aquatic lands. All statutes and guidance on nonwater-dependent uses in general also apply to linear projects. SEE ALSO: Nonwater-dependent uses.

Linear projects are often placed directly on aquatic lands, attached to other facilities such as bridges or poles, or installed in tubes or tunnels bored under aquatic lands. Linear projects range from small public road and utility crossings to major continuous transmission lines for highly profitable private businesses of state, national, or international scope.

Proponents for linear projects often wish to cross state-owned aquatic lands to maintain the continuity of their route. Proposed linear projects are sometimes consistent with aquatic land use plans, but just as often they are inconsistent with other uses of public lands and resources.

Historically, public and government sentiment promoted the development of linear projects which provide economically valuable services. The use of state-owned aquatic lands for such projects was seen as inherently acceptable or desirable, especially where project proponents could not practically avoid crossing these lands. At the same time, the value of submerged lands has often been difficult to determine. As a result, the Legislature has granted mandatory, discounted or even free use of state-owned aquatic lands for some public utilities.

In other cases, the department has not been aggressive in denying inappropriate rights-of-way or charging the full allowable amounts. Fees have been low, easements have been granted in perpetuity or for very long terms, and decisions for even large facilities have been treated as routine. In many cases, linear projects have been constructed on aquatic lands without obtaining state permission, and these now exist as trespasses.

When a linear project is proposed, the department must decide whether to grant an easement much like any other use authorization. If authorization is granted, the department must determine the term of the easement and how to address risk associated with the project. These decisions must be approached in a way that avoids imposing unacceptable constraints on the public's future use and enjoyment of the aquatic resources. The department's obligation is to recognize the long-term encumbrance created by an easement for a linear project, minimize damage to habitats, water and sediment quality, protect public amenities of state-owned aquatic lands, and ensure that its decisions maintain or increase the long-term value of these lands. SEE ALSO: Use authorizations; Public benefits.

Currently, the department is giving more attention to the granting of rights for linear projects on state-owned aquatic lands. It is attempting to ensure that only projects consistent with department land use plans and policies are authorized and to capture the true value of the publicly-owned lands and rights granted for the proposed use. One major new component of evaluating linear projects is understanding the diverse and evolving economic and market factors influencing these projects to better capture the true value.

In addition, the department is pursuing the creation of corridors to accommodate linear projects, rather than just allowing the placement of rights-of-ways in a location most expedient to the project proponent. Such corridors should be identified whenever possible as part of local land use plans, aquascape plans, and zoning codes.

Legal guidance may also come from state and federal regulatory and case law pertaining to utilities and communication facilities. Region staff should seek guidance from the Division if questions arise over legal rights to cross state-owned aquatic lands.

LINEAR PROJECTS: AUTHORIZATION DECISIONS

Discussion on linear projects: authorization decisions

Until more complete guidance is approved, Executive Management approval is required before making any formal or informal offer on a linear project to an applicant. Staff should direct a preliminary recommendation to their Region Manager for approval and for forwarding to Executive Management.

The decision on whether to grant an easement for a linear project should first consider the same issues as for other

nonwater-dependent uses. At a minimum, the project must be compatible with current or planned water-dependent uses in the area. As with all leases or easements, the department must identify the public values and benefits of the state-owned aquatic lands in question — for environmental protection, utilization of renewable resources, public access and recreation, and use for other purposes — and from which qualities these values and benefits derive. Then, the department can determine whether they will be reduced or enhanced by the linear project. SEE ALSO: Nonwater-dependent uses; Public benefits.

In addition, linear projects require greater review because of their long-term and geographically unusual nature. The amount of department resources committed to the review, the level of management attention, and the strictness of requirements on the project should be generally proportionate to the environmental, financial, geographic and temporal scale of the project.

In addition to nonwater-dependent standards, the following standards apply specifically to decisions on linear projects:

- Upland and aquatic program decisions on linear projects should be integrated whenever possible.

- The department should coordinate consideration of the upland and aquatic portions of the same project, preferably reviewing them simultaneously and preparing either matching documents or a single combined document. Valuation methodologies should be consistent between upland and aquatic programs, though the values for each portion of the project may not be identical.

- Given the long-term nature of most linear projects, the department must make a special effort to avoid serious or irrevocable environmental impacts, as well as commitments of aquatic lands which are likely to restrict other uses.

- The applicant must demonstrate that environmental impacts are insignificant, unlikely or repairable, and must meet mitigation requirements. Long-term commitments must be consistent with the longest-term appropriate land use plans available. To maintain future options, contract duration should be shortened where appropriate and contracts must include re-opener clauses to address unexpected environmental concerns. Restrictions caused by the project on other uses of aquatic lands will be considered when making decisions on whether to grant an easement and also on valuation.

- Easements must be for a limited term, with re-openers.

- No perpetual easements will be granted on state-owned aquatic lands. The standard easement term is thirty years or the life expectancy of the use or structure, whichever is shorter. Longer terms of up to 100 years may be granted for major public facilities. All easements must include re-openers coinciding with regulatory requirements or at least every ten years to address unexpected environmental impacts.

- A linear project should be located on the most feasible site with the least impacts to the environment and to other uses of aquatic lands. This may mean locating a linear project upland.

- An application for a linear project must include discussion of all reasonable alternatives so the department can consider the best location or whether the project even needs to cross state-owned aquatic lands. Applicants should outline, and staff should investigate, any alternatives which appear feasible. The department should consider its own and other agencies' land use plans, the future management of state-owned lands, any other existing or planned rights-of-way and leases, any specially designated areas, and any ecological sensitivities. In particular, the department must carefully

weigh whether concentration or separation of different rights-of-way will have the least impacts.

- The department will require projects to share the same corridor when they are compatible and the concentration of projects will not cause greater impacts than separate projects.

Like other use authorization decisions, the department should use all available means to reduce a linear projects' environmental and financial risks to the public. Such means can include gathering more information, requiring appropriate studies, shortening contract duration, establishing contract re-openers, and requiring indemnification, insurance, and bonding. During review, the department must clearly understand and describe any remaining uncertainties and the severity of any environmental or financial risks or other concerns. The department should be involved at the early stages of a proposal, and should seek to coordinate with other government agencies.

Many other government entities may have some involvement in linear projects as project sponsors, regulators, land use planners, or as proprietary managers of neighboring public lands. The applicant must receive any required permits from other agencies before an easement will be granted. Meeting the needs of those other agencies is the task of the applicant, but early involvement by the department in the project proposal should help harmonize decisions and help meet the department's proprietary requirements.

In some cases, based on its proprietary goals and responsibilities, the department may reach a different conclusion about a linear project than a regulatory or service-delivery agency. This is appropriate given the differing statutes and perspectives of each agency. Within the bounds of the relevant statutes, the department maintains final authority over use and management of state-owned aquatic lands. SEE ALSO: Regulatory agencies and permits.

If a linear project is in trespass, the decision to grant an easement will be based on whether the department would approve the project as a new proposal. For example, if a local government wished to remodel a bridge which was originally built without an easement, the newly remodeled bridge would need to have an easement and meet current standards. SEE ALSO: Unauthorized uses.

The department should seek a match between the objectives of the department and project proponents. Review and valuation methodologies should be consistent across similar projects. The department's final decision, however, must consider the unique elements of each project, and must be based solely on protecting and enhancing the many values and benefits of state-owned aquatic lands for the public.

Reversion to the state will be mandatory upon non-use or use of a right-of-way for purposes other than those granted.

LINEAR PROJECTS: PUBLIC PROJECTS

Discussion on linear projects: public projects

More than most other uses, linear projects are very often owned by or serve public agencies, such as the Department of Transportation, local governments or utility districts. Staff should give greater and more prompt attention to such projects to facilitate public benefits provided by those agencies.

This does not mean that public agencies will be granted easements for linear projects without proper review. The department must still require terms in the easement to provide for navigation and commerce, ensure environmental protection, and provide for the department's other statutory obligations. Also, the projects must be compatible with current and potential water-dependent uses in the area and must meet all mitigation requirements.

Unless otherwise provided for in statute, public agencies must pay appropriate rent. In determining or negotiating rent, the department may make allowances for the public benefits provided by the project. However, especially if the project is undertaken by a local jurisdiction and not a state agency, the department must still require reasonable rent in exchange for use of state-owned aquatic lands.

LINEAR PROJECTS: VALUATION

Discussion on linear projects: valuation

As a nonwater-dependent use, a linear project must pay full market rent to the state. Because of the unusual geographic nature of such a project, and the use of bedlands which are not sold or rented in a private market, it can be difficult to determine a market rate. SEE ALSO: Nonwater-dependent uses; Valuation.

It is the department's obligation to obtain the full legally allowable value for the public in exchange for an easement on public lands, especially considering the high value such easements can provide to a private business. This will usually be done through negotiations.

In addition to the department's general valuation standards, when valuating linear projects the department must:

- Consider the value of services or facilities that may be provided by the department, such as an existing corridor.
- Consider the value, both financial and as a benefit or service, of the proposed linear project to every party, including the operator and users, clearly identifying who realizes that value and how.
- Consider applicable valuation examples that might be found elsewhere on state-owned aquatic lands or

state-owned uplands, or from other agencies, other states or other landowners.

- Consider changes in service and income that may occur for this linear project in the future that might affect the value appropriately received by the state.

- Maintain the contractual rights and practical capacity to negotiate additional compensation for future increases in service from the project.

- Use consistent valuation methodologies between upland and aquatic programs, though the values for each portion of the project may not be identical.

- Require payment of full market value rent from each project separately, even when they are concentrated in a combined area or corridor.

Log booming and storage

RCW 79.90.465: Definitions.
(4) "Log storage" means the water storage of logs in rafts or otherwise prepared for shipment in water-borne commerce, but does not include the temporary holding of logs to be taken directly into a vessel or processing facility.
(5) "Log booming" means placing logs into and taking them out of the water, assembling and disassembling log rafts before or after their movement in water-borne commerce, related handling and sorting activities taking place in the water, and the temporary holding of logs to be taken directly into a processing facility. "Log booming" does not include the temporary holding of logs to be taken directly into a vessel.

WAC 332-30-145: Booming, rafting and storage of logs.

All requirements in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114).
(1) Unless specifically exempted in writing, all log dumps located on aquatic lands, or operated in direct association with booming grounds on aquatic land, must provide facilities for lowering logs into the water without tumbling, which loosens the bark. Free rolling of logs is not permitted.
(2) Provision must be made to securely retain all logs, chunks, and trimmings and other wood or bark particles of significant size within the leased area. Lessee will be responsible for regular cleanup and upland disposal sufficient to prevent excessive accumulation of any debris on the leased area.
(3) Unless permitted in writing, aquatic land leased for booming and rafting shall not be used for holding flat rafts except:
(a) Loads of logs averaging over 24" diameter.
(b) Raft assembly, disassembly and log sort areas.
(4) Unless permitted in writing, grounding of logs or rafts is not allowed on tidelands leased for booming and rafting. However, tidelands which were leased for booming and rafting prior to January 1, 1980, are exempt from this provision.
(5) No log raft shall remain on aquatic land for more than one year, unless specifically authorized in writing.
(6) For leases granted to serve the general needs of an area such as an island, the leased area shall be made available to others for booming and rafting and at a reasonable charge.
(7) Areas within a lease boundary meeting the definition of log booming are water- dependent uses. The rent for these areas will be calculated according to WAC 332-30-123.
(8) Areas leased for log storage shall have the rent calculated by applying a state-wide base unit rent per acre. Temporary holding of logs alongside a vessel for the purpose of loading onto the vessel is neither booming nor storage.
(9) The base unit rent, application to existing leases, and subsequent annual rents will be determined as provided for water-dependent uses under WAC 332-30-123 except for the following modifications:
(a) A formula rental calculation will be made for each such area leased as of July 1, 1984, as though the formula applied on July 1, 1984.

(b) The assessment for an upland parcel shall not be used when the following situations exist:

(i) The parcel is not assessed.

(ii) The size of the parcel in acres or square feet is not known.

(c) When necessary to select an alternative upland parcel, the nearest assessed waterfront parcel shall be used if not excluded by the criteria under (b) of this subsection.

(d) Because of the large size and shape of many log storage areas, there may be more than one upland parcel that could be used in the formula. The department shall treat such multiple parcel situations by using:

(i) The per unit value of each upland parcel applied to its portion of the lease area. If it is not possible or feasible to delineate all portions of the lease area by extending the boundaries of the upland parcel, then;

(ii) The total of the assessed value of all the upland parcels divided by the total acres of all the upland parcels shall be the per unit value applied in the formula.

(e) The total formula rents divided by the total acres under lease for log storage equals the annual base unit rent for fiscal years 1985-1989. That figure is $171.00 per acre.

(f) For purposes of calculating stairstepping of rentals allowed under WAC 332-30-123, the base unit rent multiplied by the number of acres shall be the formula rent. In cases of mixed uses, the log storage formula rent shall be added to the formula rent determinations for the other uses under leases before applying the criteria for stairstepping.

(g) Inflation adjustments to the base rent shall begin on July 1, 1990.

(10) On July 1, 1989, and each four years thereafter, the department shall establish a new base unit rent.

(a) The new base rent will be the previous base rent multiplied by the result of dividing the average water-dependent lease rate per acre for the prior fiscal year by the average water-dependent lease rate per acre for the fiscal year in which the base unit rent was last established. For example, the formula for the base unit rent for fiscal year 1990 would be:

FY90 BUR= FY85 BUR x (FY89 AWLR) (FY85 AWLR)

(b) When necessary to calculate the average water-dependent lease rate per acre for a fiscal year, it shall be done on or near July 1. The total formula rent plus inflation adjustments divided by the total acres of water-dependent uses affected by the formula during the prior fiscal year shall be the prior fiscal year's average.

(11) If portions of a log storage lease area are open and accessible to the general public, no rent shall be charged for such areas provided that:

(a) The area meets the public use requirements under WAC 332-30-130(9);

(b) Such areas are in a public use status for a continuous period of three months or longer during each year;

(c) The lease includes language addressing public use availability or is amended to include such language;

(d) The department approves the lessee's operations plan for public use, including safety precautions;

(e) Changes in the amount of area and/or length of time for public use availability shall only be made at the time of rental adjustment to the lease; and

(f) Annual rental for such areas will be prorated by month and charged for each month or part of a month not available to the general public.

Discussion on log booming and storage

Log booming is a water-dependent use, while log storage is a water-oriented use. Unlike other water-oriented uses, however, log storage uses a variation of the water-dependent rent formula (see below). Temporary holding of logs in the water to load them directly into a vessel is neither booming nor storage, and does not involve a lease. SEE ALSO: Water-dependent uses; Water-oriented uses.

For both log booming and log storage, the lessee must avoid excessive accumulation of wood debris on state-owned aquatic lands. Accumulated wood waste from historic log booming and storage operations can be a serious environmental problem in both fresh and marine waters. In some cases, the wood waste has been found up to 15 feet in depth beneath some operations. Because salinity affects

differently the components of different wood, chemical pollution and habitat damage can vary greatly from site to site. No guidance on this problem currently exists from regulatory agencies, although the Department of Ecology is currently identifying issues under MTCA and the Clean Water Act, and expects guidance to be available soon.

LOG BOOMING AND STORAGE: LEASING LANDS FOR LOG BOOMING

RCW 79.94.280: First class unplatted tide or shore lands-- Lease preference right to upland owners--Lease for booming purposes.

The department of natural resources is authorized to lease to the abutting upland owner any unplatted first class tide or shore lands. The department shall, prior to the issuance of any lease under the provisions of this section, fix the annual rental for said tide or shore lands and prescribe the terms and conditions of the lease. No lease issued under the provisions of this section shall be for a longer term than ten years from the date thereof, and every such lease shall be subject to termination upon ninety days' notice to the lessee in the event that the department shall decide that it is in the best interest of the state that such tide or shore lands be surveyed and platted. At the expiration of any lease issued under the provisions of this section, the lessee or his successors or assigns shall have a preference right to re-lease the lands covered by the original lease or any portion thereof, if the department shall deem it to be in the best interests of the state to re-lease the same, for succeeding periods not exceeding five years each at such rental and upon such terms and conditions as may be prescribed by said department. In case the abutting uplands are not improved and occupied for residential purposes and the abutting upland owner has not filed an application for the lease of such lands, the department may lease the same to any person for booming purposes under the terms and conditions of this section: PROVIDED, That failure to use for booming purposes any lands leased under this section for such purposes for a period of one year shall work a forfeiture of such lease and such land shall revert to the state without any notice to

the lessee upon the entry of a declaration of forfeiture in the records of the department of natural resources. [1982 1st ex.s. c 21 § 113.]

RCW 79.94.290: Second class tide or shore lands--Lease for booming purposes.

The department of natural resources is authorized to lease any second class tide or shore lands, whether reserved from sale, or from lease for other purposes, by or under authority of law, or not, except any oyster reserve containing oysters in merchantable quantities, to any person, for booming purposes, for any term not exceeding ten years from the date of such lease, for such annual rental and upon such terms and conditions as the department may fix and determine, and may also provide for forfeiture and termination of any such lease at any time for failure to pay the fixed rental or for any violation of the terms or conditions thereof. The lessee of any such lands for booming purposes shall receive, hold, and sort the logs and other timber products of all persons requesting such service and upon the same terms and without discrimination, and may charge and collect tolls for such service not to exceed seventy-five cents per thousand feet scale measure on all logs, spars, or other large timber and reasonable rates on all other timber products, and shall be subject to the same duties and liabilities, so far as the same are applicable, as are imposed upon boom companies organized under the laws of the state: PROVIDED, That failure to use any lands leased under the provisions of this section for booming purposes for a period of one year shall work a forfeiture of such lease, and such lands shall revert to the state without any notice to the lessee upon the entry of a declaration of forfeiture in the records of the department. At the expiration of any lease issued under the provisions of this section, the lessee shall have the preference right to re- lease the lands covered by his original lease for a further term, not exceeding ten years, at such rental and upon such terms and conditions as may be prescribed by the department of natural resources. [1982 1st ex.s. c 21 § 114.]

Discussion on log booming and storage: leasing lands for log booming

In general, log booming is allowed on first class tidelands or shorelands only after the abutting upland owner has failed to lease the lands. For more information on these preference rights, SEE ALSO: Use authorizations.

LOG BOOMING AND STORAGE: RENT FOR LOG STORAGE

RCW 79.90.485: Log storage rents.

(1) Until June 30, 1989, the log storage rents per acre shall be the average rents the log storage leases in effect on July 1, 1984, would have had under the formula for water-dependent leases as set out in RCW 79.90.480, except that the aquatic land values shall be thirty percent of the assessed value of the abutting upland parcels exclusive of improvements, if they are assessed. If the abutting upland parcel is not assessed, the nearest assessed upland parcel shall be used.
(2) On July 1, 1989, and every four years thereafter, the base log storage rents established under subsection (1) of this section shall be adjusted in proportion to the change in average water-dependent lease rates per acre since the date the log storage rates were last established under this section.
(3) The annual rent shall be adjusted by the inflation rate each year in which the rent is not determined under subsection (1) or (2) of this section.
(4) If the lease provides for seasonal use so that portions of the leased area are available for public use without charge part of the year, the annual rent may be discounted to reflect such public use in accordance with rules adopted by the board of natural resources. [1984 c 221 § 8.]

Discussion on log booming and storage: rent for log storage

Unlike most water-oriented uses, log storage is charged rent based on this variation of the water-dependent rent formula.

Logs, salvage

Discussion on logs, salvage

Salvage logs are found in rivers and lakes and on ocean beaches, usually as a result of a natural event such as a landslide or storm. For example, the eruption of Mt. St. Helens deposited massive numbers of salvage logs on state-owned aquatic lands.

Generally, the department does not deal with salvage logs except in emergency situations because it is not cost effective and ownership of logs may not be clear.

Stray logs and wood debris can be hazardous to navigation. SEE ALSO: Navigation.

Their presence may also have negative environmental impacts, including:

- Loss of oxygen in the water column due to breakdown of organic debris.
- Turbidity caused when submerged logs are pulled up to the surface.
- Release of toxins from treated material.
- Scouring of beaches or shellfish beds resulting from wave or tidal action.

SEE ALSO: Environmental protection.

On the positive side, submerged logs may improve fish habitat by shading areas or replacing natural components that have been removed over time. Beached logs may also provide habitat for other aquatic animals, such as small crabs.

The department has authority to sell valuable materials, including stray logs, from state-owned aquatic lands. The department may also authorize other agencies to remove

valuable materials from state-owned aquatic lands without charge under public contract for channel or harbor improvements or flood control. SEE ALSO: Sales.

A log with a registered mark or brand is presumed to be the property of the brand owner. Unbranded or unmarked stray logs adrift on state waters become the property of the state when recovered.

Decisions regarding removal of stray logs and wood debris should focus on minimizing the state's liability and involvement. The department should only authorize removal of stray logs and wood debris that are imminently hazardous to navigation, endanger life, property, or the environment, or threaten publicly-owned resources.

To minimize the state's involvement, the department should encourage others to do the removal or salvaging whenever possible. For example, RCW 36.32.290 authorizes counties to remove drifts, jams, logs and debris for flood prevention purposes.

When no one else will remove logs or debris, the department should weigh the cost of removal against the risk. Unless the presence of the logs represents a hazard, logs and wood debris should remain in the natural environment as a benefit to fish and wildlife.

In the past, a log patrol program licensed operators to retrieve logs from all waters of the state. This program caused problems with local governments, ports, waterfront property owners and boat owners, and kept other groups from dealing with nuisance logs that threatened marinas, waterfront structures or navigational safety. In 1994, the legislature repealed these provisions.

The department should seek to reduce its liability by encouraging the removal of hazardous, stranded or stray logs and wood debris and by working in coordination with federal, state and local agencies and local salvagers. Allowing

salvagers to remove adrift logs at no cost encourages them to remove even marginally salvageable material because they receive all the proceeds from the sale. The benefit to the state is that hazardous floating material is removed from navigable waterways, reducing any potential liability if a boat runs into it or it washes into a dock or other structure.

M

Management goals

SEE: Public benefits.

Marinas and moorage facilities

WAC 332-30-106 Definitions.
All definitions in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114). For the purpose of this chapter:
(11) "Covered moorage" means slips and mooring floats that are covered by a single roof with no dividing walls.
(15) "Enclosed moorage" means moorage that has completely enclosed roof, side and end walls similar to a car garage i.e. boathouse.
(43) "Open moorage" means moorage slips and mooring floats that have completely open sides and tops.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.
(5) Shallow draft uses, such as barge terminals and marinas, shall be preferred over deep draft uses in areas requiring extensive maintenance dredging except the Columbia River.
(6) Multiple use of existing pier and wharf facilities will be encouraged, to reduce the need for adding new facilities.
(20) Anchorage areas on the beds of navigable waters may be designated by the department for mooring boats.
(21) Houseboats are considered to be a low priority use of aquatic land.

WAC 332-30-139: Marinas and moorages.

(1) Moorage facilities developed on aquatic lands should meet the following design criteria:
(a) Moorage shall be designed so as to be compatible with the local environment and to minimize adverse esthetic impacts.
(b) Open moorage is preferred in relatively undeveloped areas and locations where view preservation is desirable, and/or where leisure activities are prevalent.
(c) Covered moorage may be considered in highly developed areas and locations having a commercial environment.
(d) Enclosed moorage should be confined to areas of an industrial character where there is a minimum of esthetic concern.
(e) In general, covered moorage is preferred to enclosed moorage and open moorage is preferred to covered moorage.
(f) View encumbrance due to enclosed moorage shall be avoided in those areas where views are an important element in the local environment.
(g) In order to minimize the impact of moorage demand on natural shorelines, large marina developments in urban areas should be fostered in preference to numerous small marinas widely distributed.
(h) The use of floating breakwaters shall be considered as protective structures before using solid fills.
(i) Dry moorage facilities (stacked dry boat storage) shall be considered as an alternative to wet storage in those locations where such storage will:
(ii) Significantly reduce environmental or land use impacts within the water area of the immediate shoreline.
(iii) Reduce the need for expansion of existing wet storage when such expansion would significantly impact the environment or adjacent land use.
(2) Anchorages suitable for both residential and transient use will be identified and established by the department in appropriate locations so as to provide additional moorage space.
(3) Upland sewage disposal approved by local government and appropriate state agencies is required for all vessels used as a residence at a marina or other location.
(4) The department shall work with federal, state, local government agencies and other groups to determine acceptable locations for

marina development, properly distributed to meet projected public need for the period 1980 to 2010.

Discussion on marinas and moorage facilities

Marinas and moorage facilities (the terms are interchangeable) are water-dependent uses, and therefore are to be fostered on state-owned aquatic lands. However, marinas can cause greater environmental harm to state-owned aquatic lands than many people would expect. To properly protect aquatic resources, marina leases require special attention. SEE ALSO: Water-dependent uses; Use authorizations.

The siting and construction of a marina can cause extensive physical damage to the environment. Pilings, breakwaters, and bulkheads all cause major disruptions to aquatic habitat. Poorly designed dock construction can change wave and sediment patterns, leading to the loss of sand and beaches. Docks and boats shade the water, reducing aquatic vegetation. Marina slips are commonly leased to third parties which complicates efforts to monitor and prevent impacts.

Because of the risk of pollution from marinas, the Department of Health will establish a shellfish closure zone around marinas unless the marina has a pump-out facility and a watch person on-site to ensure that best management practices are followed. The Department of Natural Resources requires all new marinas to have pump-out facilities and to adopt best management practices to assure that no discharges occur, and will work with existing marinas to bring pump-out facilities on-line as soon as possible.

Open moorage is favored over covered or enclosed moorage, and covered moorage over enclosed. Covered and enclosed moorage cause greater environmental impacts because they shade the water. They also cause greater aesthetic impacts to surrounding communities.

A marina lease must include provisions for sufficient maneuvering room for entering and exiting the marina. The department does not guarantee that adjacent open-water areas will be available for access to marina facilities, unless these adjacent areas are under lease by the marina owner.

Like other leases, a lease for a marina is limited to 30 years. Occasionally, banks or other lenders who make loans to marina owners may request a secured interest in a marina lease. A secured interest essentially pre-approves the assignment of the lease to the lender in the event that the marina owner defaults on a loan. The department may approve a secured interest provided all financial, environmental, and other requirements and terms of the original lease would be upheld by the lender. SEE ALSO: Use authorizations.

MARINAS AND MOORAGE FACILITIES: CONDOMINIUMIZATION OF MARINA SLIPS

Discussion on marinas and moorage facilities: condominiumization of marina slips

Condominiumization occurs when the marina operator sells a marina slip “permanently” rather than collecting annual rent from the boat owner. Sometimes this occurs in conjunction with the sale of upland condominium apartments or townhouses.

The department strongly discourages the condominiumization of marinas. One reason for this position is the cost of processing requests to convert a marina to a condominium, and the subsequent increased cost to administer such leases. Additional concerns have centered around the value transfer that occurs between the marina owner and the slip purchaser. Typically, no additional value is received by the state in such transactions. Also, condominiumization often leads to conflicts and confusion over what the lessee or slip

buyer “owns,” as actual ownership of the land has not been transferred from the state to the lessee and cannot be transferred to the slip buyer.

The department should make it very clear that, regardless of any agreement between the marina operator and a boat owner, the department does not recognize any commitment of state-owned aquatic lands outside the terms of the lease, and does not in any case issue permanent leases. Furthermore, marina operators and other tenants do not have legal authority to sell state-owned aquatic land or to sub-lease the land for longer than the term of the lease. Therefore, once the lease expires, or if the lease is canceled early for any reason, the department will not recognize any claim by a boat owner or “slip owner” to the use of a condominiumized marina slip or to any portion of the state-owned aquatic lands in question. To avoid misunderstandings, the lessee is required to have pre-authorization by the department for any condominiumization, and must notify potential condominiumized slip buyers of the department's position on this matter.

Within these limits, a marina owner may wish to condominiumize "temporarily" for as long as the lease is in effect. The marina owner will remain responsible for all the terms of the lease, including any environmental or other protections.

If a condominiumized marina slip is intended for residential use, it must meet all requirements applicable to residential uses and to nonwater-dependent uses, in addition to meeting all requirements applicable to condominiumization. SEE ALSO: Residential uses; Nonwater-dependent uses.

MARINAS AND MOORAGE FACILITIES: RESIDENTIAL USES

Discussion on marinas and moorage facilities: residential uses

Residential uses within a marina are usually considered nonwater-dependent uses and, as such, are generally not authorized. The exception may be houseboats and structures similar to houseboats existing on or before October 1, 1984. Even if local regulations allow for residential uses in marinas or on aquatic lands, this does not mean they will be allowed by the department on state-owned aquatic lands. If residential uses are permitted in a marina, they must have upland sewage disposal approved by local government and appropriate state agencies, generally through a sewer hookup or documented use of a pump-out. Also, if permitted, the marina owner must pay full market rent for this nonwater-dependent portion of the marina. SEE ALSO: Residential uses; Nonwater-dependent uses.

MARINAS AND MOORAGE FACILITIES: SPILLS AND POLLUTION CONTROL

Discussion on marinas and moorage facilities: spills and pollution control

Taken as a whole, a marina can sometimes discharge more pollutants than an industrial outfall. Every marina lease requires a spill response plan for major and minor spills and a plan for source control, both to be properly operated and enforced by the marina owner. While marinas may not present as many potential chemical hazards as industrial uses, there are still opportunities for major spills, in particular from gas docks, boat painting or repair facilities, and sewage lines. In addition to major spills, marinas can experience constant low-level discharges of gasoline, motor oil, cleaners, paints, sewage and "gray water" (dirty water from sinks, showers and washing). Because occasional or recreational boaters are not required to take the major precautions that other users do to receive permits, they may not be as concerned or aware of pollution issues.

Copies of a spill response plan and source control plan must be included as exhibits in the lease. Plans provided by the marina for a regulatory agency may be satisfactory for the lease, but should be reviewed by department staff.

Memoranda of understanding/agreement

Discussion of memoranda of understanding/agreement

A memorandum of understanding (MOU), a memorandum of agreement (MOA) or an interagency agreement (IA) is a formal agreement between two or more parties (e.g., individuals, government agencies, tribal governments) which describes how the parties will work together to create a new process or improve an existing one. Sometimes an MOA/MOU will state agreed-upon assumptions and guidelines.

Agreements between the department and other entities obligate the department by making commitments and formalizing performance expectations. Agreements can provide benefits to the department. Improper agreements can cause problems such as reducing management options, incorrectly articulating the department's intent, and unnecessarily increasing the department's liability. It is important that any agreement appropriately reflect department policy, meet legal requirements, and accurately reflect department commitments.

It is the department’s policy to limit the number of formal agreements to those which are absolutely necessary and which can be effectively implemented. (Policy PO04-001) Therefore, whenever possible, letters should be used to articulate most agreements. More formal agreements should be used only for specific purposes where the parties are creating obligations, the issues are particularly complex, or

there are numerous parties involved and there is a high probability for misunderstanding.

The department has entered into numerous agreements which facilitate the management of state-owned aquatic lands and the department's relationship with other entities. Some important existing agreements include:

Inter-Agency Permit Streamlining Document on Shellfish and Domestic Wastewater Discharge Outfall Projects

This agreement, prepared in 1995 between the department and the departments of Health, Fish and Wildlife, and Ecology, represents the efforts of these agencies to improve the process by which domestic wastewater outfall projects in marine waters are reviewed and approved. A major part of this process is ensuring that impacts to shellfish are minimized and that unavoidable impacts are mitigated and compensated for, if appropriate.

One of the main goals of this agreement is to reduce impacts to shellfish populations and to improve and increase harvestable areas and quantities of shellfish. The MOA does not address private, industrial or domestic outfalls in fresh waters. After the MOA was complete, two separate guidance documents were developed on Domestic Waste Outfall Siting in Marine Waters and Municipal Outfall Siting.

Contaminated Sediment Source Control, Cleanup and Disposal

The purpose of this MOA, completed in 1992 between the department and the Department of Ecology, is to ensure integration of the state's regulatory and proprietary authorities for the prevention, investigation, and cleanup of contaminated sediment sites. The agreement is designed to establish clear and simple

procedures to ensure continued communication and cooperation between Ecology and the department.

Interagency/Intergovernmental Agreement on a Cooperative Sediment Management Program

This agreement between the department, the Department of Ecology, the Puget Sound Water Quality Action Team, the Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers established a coordinated interagency program to address sediment management issues, emphasizing shared responsibilities and resources.

Sediment agreement with the Tulalip Tribe

The primary purpose of this MOU between the department, EPA, and the Tulalip Tribe is to facilitate the start of cleanup activities at the Tulalip Superfund site. The main issues revolve around the quantity of state-owned sediments to be used in the cleanup, the sites and sources of sediment, and the type of liability relief to be provided.

State liability at federally listed "Superfund" (CERCLA) sites (Framework Agreement)

The department and EPA have established a framework agreement on resolving state liability at federally listed "Superfund" (CERCLA) sites in Puget Sound.

Implementation of watershed planning

This is an MOU on implementation of watershed planning between the department; the state departments of Agriculture, Community Trade and Economic Development, Ecology, Fish and Wildlife, Health, and Transportation; the Conservation Commission; the Interagency Committee for Outdoor Recreation; and the Puget Sound Water Quality Action Team. This MOU

clarifies the roles and responsibilities of the various state agencies under watershed planning and salmon recovery at the local level.

Copies of these memoranda are available from the Division.

Mining and prospecting

RCW 79.90.330: Leases and permits for prospecting and contracts for mining valuable minerals and specific materials from aquatic lands.

The department of natural resources may issue permits and leases for prospecting, placer mining contracts, and contracts for the mining of valuable minerals and specific materials, except rock, gravel, sand, silt, coal, or hydrocarbons, upon and from any aquatic lands belonging to the state, or which have been sold and the minerals thereon reserved by the state in tracts not to exceed six hundred forty acres or an entire government-surveyed section. The procedures contained at RCW 79.01.616 through 79.01.651, inclusive, shall apply thereto.

RCW 79.90.500: Aquatic lands--Rents for nonwater-dependent uses--Rents and fees for the recovery of mineral or geothermal resources.

Leases for nonwater-dependent uses of state-owned aquatic lands shall be charged the fair market rental value of the leased lands, determined in accordance with appraisal techniques specified by rule. However, rents for nonwater-dependent uses shall always be more than the amount that would be charged as rent for a water-dependent use of the same parcel. Rents and fees for the mining or other recovery of mineral or geothermal resources shall be established through competitive bidding, negotiations, or as otherwise provided by statute.

Discussion on mining and prospecting

The department does not commonly grant authorizations for mining or prospecting, in part because we are not commonly asked. When asked, the procedures in RCW 79.01.616

through 79.01.651, which are the department's general mining statutes, apply. The most important phrase in these is found in RCW 79.01.620, which states "the department may reject an application for a mineral prospecting lease when the department determines rejection to be in the best interests of the state."

The department usually will not grant authorization for recreational prospecting on state-owned aquatic lands, because of the likely environmental impacts and the few public benefits. Commercial prospecting or mining would require significant measures to avoid potential environmental impacts. SEE ALSO: Environmental protection; Commercial and industrial uses.

This section on mining and prospecting does not apply to harvesting of rock, gravel, sand, and silt. SEE ALSO: Sand and gravel.

Mitigation

[Guidance on mitigation is not yet included, pending approval by Executive Management.]

Mooring buoys and swim rafts

WAC 332-30-122: Aquatic land use authorization.

All requirements in this section shall apply to the department. Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) General requirements.

(b) Determination of the area encumbered by an authorization for use shall be made by the department based on the impact to public use and subsequent management of any remaining unencumbered public land.

(ii) Areas for individual mooring buoys will be a circle with a radius equal to the expected swing of the vessel or object moored. Only the area encumbered at any given point in time shall be used to calculate any rentals due.

WAC 332-30-148: Swim rafts and mooring buoys.

(1) Swim rafts or mooring buoys will not be authorized where such structures will interfere with heavily traveled routes for watercraft, commercial fishing areas or on designated public use - wilderness beaches.

(2) Swim rafts or mooring buoys may be authorized on aquatic lands shoreward of the -3 fathom contour or within 200 feet of extreme low water or line of navigability whichever is appropriate. The placement of rafts and buoys beyond the -3 fathom contour or 200 feet will be evaluated on a case by case basis.

(3) No more than one structure may be installed for each ownership beyond extreme low water or line of navigability. However, ownerships exceeding 200 feet as measured along the shoreline may be permitted more installations on a case by case basis.

(4) Swim rafts or buoys must float at least 12" above the water and be a light or bright color.

(5) Mooring buoys may be authorized beyond the limits described above on land designated by the department for anchorages.

Discussion on mooring buoys and swim rafts

While mooring buoys may generally have less environmental impact than a major permanent structure, staff must still address the possible effects of the mooring on the bedlands, especially on any aquatic vegetation that might be damaged by the buoy line, and the possibility of sewage or gray water disposal from moored vessels. Also, the department must ensure that the placement of mooring buoys allows for navigation to and past the buoys. Mooring buoys should be designed so they can be completely removed.

Placement of mooring buoys or swim rafts require a use authorization. The area to be leased for a mooring buoy is a

circle with a radius equal to the expected swing of the vessel or object moored. SEE ALSO: Use authorizations.

Multiple use

RCW 79.68.090: Multiple use land resource allocation plan-Adoption-Factors considered.

The department of natural resources may adopt a multiple use land resource allocation plan for all or portions of the lands under its jurisdiction providing for the identification and establishment of areas of land uses and identifying those uses which are best suited to achieve the purposes of RCW 79.01.128, 79.44.003 and this chapter. Such plans shall take into consideration the various ecological conditions, elevations, soils, natural features, vegetative cover, climate, geographical location, values, public use potential, accessibility, economic uses, recreational potentials, local and regional land use plans or zones, local, regional, state and federal comprehensive land use plans or studies, and all other factors necessary to achieve the purposes of RCW 79.01.128, 79.44.003 and this chapter.

WAC 332-30-106 Definitions.

(39) "Multiple use management" means a management philosophy which seeks to insure that several uses or activities can occur at the same place at the same time. The mechanism involves identification of the primary use of the land with provisions such as performance standards to permit compatible secondary uses to occur.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(6) Multiple use of existing pier and wharf facilities will be encouraged, to reduce the need for adding new facilities.

Discussion on multiple use

Whenever practical, the department should encourage multiple uses of state-owned aquatic lands. The goal is that, as often as possible, state-owned aquatic lands should provide and be used for more than one purpose and more than one public benefit. While not every use of state-owned aquatic lands can provide all public benefits, all these benefits should be explicitly considered when deciding on a proposed use of these lands. SEE ALSO: Public benefits.

When reviewing a proposed use authorization, staff should look for ways the proposal can be adjusted to allow both the primary use and “compatible secondary uses” to occur. SEE ALSO: Use authorizations.

N

National Environmental Policy Act

Discussion on National Environmental Policy Act

The National Environmental Policy Act (NEPA) is the federal law which sets the basis for environmental protection. NEPA applies only to federal actions, such as the granting of a federal permit or the federal government conducting a development project itself. It is very important for the department to comment on environmental concerns during the NEPA process, to protect the department's rights to take action on these concerns later.

NEPA requirements are very similar to State Environmental Policy Act (SEPA) requirements. An environmental assessment is used by the lead agency to determine the extent of environmental impacts associated with the project. If the project is determined to be environmentally significant, an Environmental Impact Statement (EIS) is required. If the NEPA lead agency determines a project will not significantly impact the environment, that agency issues a Finding of No Significant Impact.

A state or local agency may adopt a NEPA document as a SEPA document if the original document is found to be adequate. When both NEPA and SEPA documents are required, the NEPA and SEPA processes may be combined and a joint federal/state EIS may be prepared.

With regard to NEPA, staff should:

- **#** Routinely check for federal environmental review processes in their assigned area. One way to keep ahead of these projects is through routine communications with local federal agency representatives. Another way is to check the EPA-NEPA homepage on the Internet at http://es.epa.gov/oeca/ofa. This homepage has current information on EISs in the review stage and summaries of comments submitted on EISs. NEPA information is also available through Ecology's SEPA register.

- **#** Bring any project subject to federal permits and NEPA to the attention of the land manager's supervisor, the department's SEPA Center, the Region SEPA coordinator, and Division SEPA coordinator. Major projects may require a coordinated review, and if so, these projects must be raised to executive management either for information or for direct policy involvement.

If public hearings are held on a project that has the potential to have major impacts on state-owned aquatic lands, the department should be present at the hearings and prepared to offer comments and concerns. Staff should work with the Region or Division SEPA coordinators on the comments to be submitted. Such comments should be coordinated between the Region and the Division. Comments should be thorough, diplomatic and submitted in a timely fashion. Copies of comments should be forwarded to the department SEPA Center, Region SEPA coordinator, and Division SEPA coordinator.

SEE ALSO: State Environmental Policy Act.

Natural resource damage assessments

Discussion on natural resource damage assessments

Several laws allow for the recovery of damages for injuries to natural resources. CERCLA, MTCA, and state and federal oil pollution laws cover injuries that may result from oil spills or other hazardous substances. SEE ALSO: Pollution laws.

Under these laws, trustee agencies, including the department, may pursue responsible parties to recover damages for injury to, destruction or loss of natural resources, including restoration costs and the reasonable costs of assessing such injury, destruction or loss. The objective is to make sure the natural resource is restored, not merely that the contamination is removed or the unauthorized use is halted. Usually, a lead administrative trustee agency, which may or may not be the department, is appointed to facilitate response by all interested trustee agencies.

Natural resource damage assessments and other legal action to recover damage will be directed by the Division. Region staff can contribute to natural resource damage assessments by promptly reporting any spills, trespasses, or harm to state-owned aquatic lands. Reports should be provided to Division staff. If the situation is an emergency, notify appropriate law enforcement, Coast Guard, or spill response staff.

In addition to natural resource damage assessment laws, the department can address trespasses and other unauthorized uses and activities which damage state-owned aquatic lands. Region staff should report and document such uses and activities promptly to allow the department to best respond to them. SEE ALSO: Unauthorized uses.

Navigation

RCW 88.28.050: Obstructing navigation--Penalty.

Every person who shall in any manner obstruct the navigable portion or channel of any bay, harbor, or river or stream, within or bordering upon this state, navigable and generally used for the navigation of vessels, boats, or other watercrafts, or for the floating down of logs, cord wood, fencing posts or rails, shall, on conviction thereof, be fined in any sum not exceeding three hundred dollars: PROVIDED, That the placing of any mill dam or boom across a stream used for floating saw logs, cord wood, fencing posts or rails shall not be construed to be an obstruction to the navigation of such stream, if the same shall be so constructed as to allow the passage of boats, saw logs, cord wood, fencing posts or rails without unreasonable delay: PROVIDED FURTHER, That the obstruction of navigable waters for the purpose of deploying equipment to contain or clean up a spill of oil or other hazardous material shall not be considered an obstruction.

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(1) The management of state-owned aquatic lands shall preserve and enhance water-dependent uses. Water-dependent uses shall be favored over other uses in aquatic land planning and in resolving conflicts between competing lease applications. In cases of conflict between water-dependent uses, priority shall be given to uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters, and to state-wide interests as distinguished from local interests.

WAC 332-30-106 Definitions.

(40) "Navigability or navigable" means that a body of water is capable or susceptible of having been or being used for the transport of useful commerce. The state of Washington considers all bodies of water meandered by government surveyors as navigable unless otherwise declared by a court.

(41) "Navigation" means the movement of vessels to and from piers and wharves.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(8) Whenever structures are used for aquaculture on the beds of navigable waters, they shall be located in such a way as to minimize the interference with navigation and fishing and strive to reduce adverse visual impacts.
(12) Insofar as possible uses of these aquatic lands shall have a minimum interference with surface navigation.

WAC 332-30-144: Private recreational docks.

(5) Revocation. The permission [for a private recreational dock] may be revoked or canceled if:

(b) The dock significantly interferes with navigation or with navigational access to and from other upland properties. This degree of interference shall be determined from the character of the shoreline and water body, the character of other in-water development in the vicinity, and the degree of navigational use by the public and adjacent property owners;

Discussion on navigation

Whenever the department considers granting authorization to use state-owned aquatic lands, it must seek the "minimum interference with surface navigation." In particular, according to the state Constitution, harbor areas and waterways are specifically reserved for the "conveniences of navigation and commerce." SEE ALSO: Use authorizations; Harbor areas; Waterways.

Nonwater-dependent uses

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(1) The management of state-owned aquatic lands shall preserve and enhance water-dependent uses. Water-dependent uses shall

be favored over other uses in aquatic land planning and in resolving conflicts between competing lease applications. In cases of conflict between water-dependent uses, priority shall be given to uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters, and to state-wide interests as distinguished from local interests.
(2) Nonwater-dependent use of state-owned aquatic lands is a low-priority use providing minimal public benefits and shall not be permitted to expand or be established in new areas except in exceptional circumstances where it is compatible with water-dependent uses occurring in or planned for the area.

RCW 79.90.465: Definitions.

(3) "Nonwater-dependent use" means a use which can operate in a location other than on the waterfront. Examples include, but are not limited to, hotels, condominiums, apartments, restaurants, retail stores, and warehouses not part of a marine terminal or transfer facility.

Discussion on nonwater-dependent uses

The Legislature recognized nonwater-dependent uses of state-owned aquatic lands as low-priority uses which provide minimal public benefits. Even as the department encourages and fosters water-dependent uses on state-owned aquatic lands, it may not authorize nonwater-dependent uses except in very limited circumstances. Nonwater-dependent uses must always yield to water-dependent uses, and, if allowed at all, must be compatible with water-dependent uses which either already exist or are planned. The department will strongly discourage and usually not authorize the establishment or expansion of nonwater-dependent uses on state-owned aquatic lands.

The definition in RCW 79.90.465 is not an exhaustive list of nonwater-dependent uses. The key to deciding what is or is not a nonwater-dependent use is determining whether the use must be on the water itself. If the activity would merely be more convenient to have on the water, but does not need to be there, it is not water-dependent. Also, if the activity

should be near the water, but does not need to be on it, it is not water-dependent. In these cases, the use will be either water-oriented or nonwater-dependent. Water-oriented uses is a limited category for historic waterfront activities. If in doubt, a use is to be considered nonwater-dependent.

SEE ALSO: Public benefits, Water-dependent uses; Water-oriented uses.

As further described below, the department will reject an application for a lease or re-lease of a nonwater-dependent use of state-owned aquatic lands if:

- There are no qualifying exceptional circumstances;
- The use is incompatible with existing or planned water-dependent uses;
- The use will conflict with the other public benefits of aquatic lands, or with any aquatic uses or resources of state-wide value; or
- The use will cause significant adverse environmental impacts.

NONWATER-DEPENDENT USES: ENVIRONMENTAL PROTECTION

WAC 332-30122: Aquatic Land Use Authorization.

(2) Application review. In addition to other management considerations, the following special analysis shall be given to specific proposed uses:

(a) Environment.

(iii) Nonwater-dependent uses which have significant adverse environmental impacts shall not be authorized.

Discussion on nonwater-dependent uses: environmental protection

If a nonwater-dependent use causes any significant adverse environmental impacts, the use must be altered or re-designed to completely avoid the impacts or the department will reject the application for the nonwater-dependent use. In

terms of mitigation, this means the damage to aquatic habitat or other ecological functions must be avoided, not merely compensated for by replacing habitat elsewhere. SEE ALSO: Environmental protection; Mitigation.

NONWATER-DEPENDENT USES: EXCEPTIONAL CIRCUMSTANCES AND COMPATIBILITY WITH WATER-DEPENDENT USES

WAC 332-30-137: Nonwater-dependent uses.

Policy. Nonwater-dependent use of state- owned aquatic lands is a low priority use providing minimal public benefits. Nonwater-dependent uses shall not be permitted to expand or be established in new areas except in exceptional circumstances and when compatible with water-dependent uses existing in or planned for the area. Analysis under this section will be used to determine the terms and conditions of allowable nonwater-dependent use leases. The department will give public notice of sites proposed for nonwater-dependent use leases.

(1) Exceptional circumstances. The following are exceptional circumstances when nonwater-dependent uses may be allowed:

(a) Nonwater-dependent accessory uses to water-dependent uses such as delivery and service parking, lunch rooms, and plant offices.

(b) Mixed water-dependent and nonwater-dependent development. The water-dependent component shall be a major project element. The nonwater-dependent use shall significantly enhance water- dependent uses and/or resources of state-wide value.

(c) Nonwater-dependent uses in structures constructed, or on sites filled, prior to June 30, 1985.

(d) Expansion or realignment of essential public nonwater-dependent facilities such as airports, highways and sewage treatment plants where upland topography, economics, or other factors preclude alternative locations.

(e) When acceptable sites and circumstances are identified in adopted local shoreline management master programs which

provide for the present and future needs of all uses and resources of state-wide value, identify specific areas or situations in which nonwater-dependent uses will be allowed, and justify the exceptional nature of those areas or situations.

(2) Compatibility with water-dependent uses. Nonwater-dependent uses will only be allowed when they are compatible with water-dependent uses existing in or planned for the area. Evaluation of compatibility will consider the following:

(a) Current and future demands for the site by water-dependent uses.

(b) The effect on the usefulness of adjacent areas for water-dependent uses.

(c) The probability of attracting additional water-dependent or nonwater-dependent uses.

(d) Subsidies offered to water-dependent uses.

(3) Evaluation. Proposed nonwater- dependent uses will be evaluated individually. Applicants must demonstrate the proposed nonwater-dependent uses are consistent with subsections (1) and (2) of this section and any other applicable provisions of this chapter.

Discussion on nonwater-dependent uses: exceptional circumstances and compatibility with water-dependent uses

An "accessory use" to a water-dependent use means that the accessory must be a minor element of the entire use, and must be necessary to have on-site to support the larger water-dependent activity or facility. It would not be acceptable to have a nonwater-dependent accessory which is merely useful to the applicant, as opposed to necessary, or which could effectively be located at another site away from state-owned aquatic lands.

Examples of a mixed water-dependent/nonwater-dependent development include parking on a pier for a boat tour company, waterfront food service, a news stand at a ferry terminal, or water taxi service.

These various criteria apply to all nonwater-dependent uses on state-owned aquatic lands. The determination of whether any of these criteria are met is made exclusively by the department, based on the best information available to staff. This determination must be made before an initial lease, before a re-lease, whenever the use significantly changes, and whenever the department has the option of altering or terminating the lease, such as through a re-opener clause.

NONWATER-DEPENDENT USES: RE-LEASES

WAC 332-30-137: Nonwater-dependent uses.

(4) Re-leases. Re-leases of nonwater- dependent uses will be evaluated as new uses. If continuance of the nonwater-dependent use substantially conflicts with uses or resources of state-wide value or with shoreline master program planning or supplemental planning developed under WAC 332-30-107(5), or if the site is needed by a use of state-wide value, the re-lease will not be approved.

Discussion on nonwater-dependent uses: re-leases

When a lease expires, an application for re-lease for a nonwater-dependent use will be evaluated as an entirely new use. To receive a new lease, the nonwater-dependent use must – at the time of re-application – meet a qualifying exceptional circumstance, be compatible with existing and planned water-dependent uses, not conflict with other public benefits, and not cause significant adverse environmental impacts. This is true no matter why or how the nonwater-dependent use was originally authorized.

In harbor areas, there is an additional specific statutory obligation to evaluate the public's water-dependent needs prior to re-leasing a nonwater-dependent use. SEE ALSO: Harbor areas.

If the nonwater-dependent use is re-leased, the tenant must pay current full market rent, established in the same manner as for other nonwater-dependent uses, regardless of the previous rental rate.

NONWATER-DEPENDENT USES: RENT

RCW 79.90.500: Aquatic lands--Rents for nonwater-dependent uses--Rents and fees for the recovery of mineral or geothermal resources.

Leases for nonwater-dependent uses of state-owned aquatic lands shall be charged the fair market rental value of the leased lands, determined in accordance with appraisal techniques specified by rule. However, rents for nonwater-dependent uses shall always be more than the amount that would be charged as rent for a water-dependent use of the same parcel. Rents and fees for the mining or other recovery of mineral or geothermal resources shall be established through competitive bidding, negotiations, or as otherwise provided by statute.

WAC 332-30-106 Definitions.

(19) "Fair market value" means the amount of money which a purchaser willing, but not obligated, to buy the property would pay an owner willing, but not obligated, to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied (Donaldson v. Greenwood, 40 Wn.2d 238, 1952). Such uses must be consistent with applicable federal, state and local laws and regulations affecting the property as of the date of valuation.

WAC 332-30-125: Aquatic land use rental rates for nonwater-dependent uses.

All requirements in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) The value of state-owned aquatic lands withdrawn from general public use for private nonwater-dependent use shall be recognized by charging lessees the full fair market rental. No rent shall be charged for improvements, including fills, on aquatic lands unless owned by the state. The fair market rental is based on:

(a) Comparable non-DNR market rents, whether based on land value exclusive of improvements, a percent of gross revenues, or other appropriate basis, or if not available (b) the full market value (same as true and fair value) multiplied by the use rate percentage as determined under subsection (2) of this section and published in the Washington State Register.

(2) Use rate percentage.

(a) The percentage rate will be based on nondepartmental market rental rates of return for comparable properties leased on comparable terms in the locality, or when such do not exist;

(b) The percentage rate of return shall be based on the average rate charged by lending institutions in the area for long term (or term equivalent to the length of the lease) mortgages for comparable uses of real property.

(3) Appraisals: The determination of fair market value shall be based on the indications of value resulting from the application of as many of the following techniques as are appropriate for the use to be authorized:

(a) Shore contribution; utilizing differences in value between waterfront properties and comparable nonwaterfront properties. Generally best for related land-water uses which are independent of each other or not needed for the upland use to exist.

(b) Comparable upland use (substitution); utilizing capacity, development, operation, and maintenance ratios between a use on upland and similar use on aquatic land with such ratios being applied to upland value to provide indication of aquatic land value for such use. Generally best for aquatic land uses which are totally independent of adjacent upland yet may also occur on upland totally independent of direct contact with water.

(c) Extension; utilizing adjacent upland value necessary for total use as the value of aquatic lands needed for use on a unit for unit basis. Generally best for aquatic land uses which are integrated with and inseparable from adjacent upland use.
(d) Market data; utilizing verified transactions between knowledgeable buyers and sellers of comparable properties. Generally best for tidelands or shorelands where sufficient data exists between knowledgeable buyers and sellers.
(e) Income; utilizing residual net income of a commercial venture as the indication of investment return to the aquatic land. This can be expressed either as a land rent per acre or as a percent of gross revenues. Generally best for income producing uses where it can be shown that an owner or manager of the operation is motivated to produce a profit while recognizing the need to obtain returns on all factors of production.

(4) Negotiation of rental amounts may occur when necessary to address the uniqueness of a particular site or use.
(5) Rental shall always be more than the amount that would be charged if the aquatic land parcel was used for water-dependent purposes.

WAC 332-30-106 Definitions.

(19) "Fair market value" means the amount of money which a purchaser willing, but not obligated, to buy the property would pay an owner willing, but not obligated, to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied (Donaldson v. Greenwood, 40 Wn.2d 238, 1952). Such uses must be consistent with applicable federal, state and local laws and regulations affecting the property as of the date of valuation.

Discussion on nonwater-dependent uses: rent

If a nonwater-dependent use is allowed, rent must be paid to the state. This rent does not follow the water-dependent rent formula. Instead, rent for a nonwater-dependent use is based on the fair market rental value of the leased aquatic lands. Nonwater-dependent uses are not to be encouraged nor subsidized by allowing them to pay rent below full market rates.

In setting market rents for nonwater-dependent uses, the department is to behave as a responsible for-profit business, establishing a fair market value and appropriate percentage of that value as the annual rent. This is a very different approach from the traditional government system of setting fixed fees or formulae. It requires staff to think more as private business would – to consider the values the applicant or other potential users would gain from the land, and to think of how much economic value they will give in return.

The department is the manager of state-owned aquatic lands on behalf of all the citizens of the state. A prudent manager of a business will seek to gain the maximum value for its owners, regardless of its role in the transaction – as buyer, seller, tenant or landlord. The goal for the department is not merely to raise the price, but to gain a fair return for the public based on the true market value of the land and the value of any lost or dedicated public resources.

The determination of rent for a nonwater-dependent use should begin with an appraisal of the land. Rather than use a standard formula, rent for each site must be determined based on the appropriate market conditions, values, and qualities of that site. Each appraisal or measure of market value will be different for different properties. The department should estimate the value by several methods, whenever feasible, with care taken to consider which methods may be most appropriate for the specific circumstances of each site and lease. These methods are described in WAC 332-30-125. For more on valuation and determining fair market value, SEE ALSO: Valuation.

After appraisal, rent for a nonwater-dependent use may be negotiated with the applicant to address unique sites or uses. In negotiations, the department must uphold the same principles of establishing a fair market value, gaining full fair market rent for the public, and appropriately compensating the state for the loss of public values.

The value the state receives in exchange for granting a nonwater-dependent use need not always be in money. Instead, the value could be in other forms which benefit the public, such as:

- A permanent easement on private aquatic lands for environmental or other purposes.
- Provision of public access.
- Provision of environmental restoration or clean up, beyond that otherwise required by law.
- Investment in infrastructure which does or will belong to the state, when the investment will create short-term or long-term benefits for the public.

Regardless of form, the department must insist on full market value for the public.

To ensure the rent is appropriate and the tenant is financially sound, the department may require the tenant to supply a business plan, financial pro forma, or other appropriate financial report for new uses and significant changes in existing uses. Again, this is based on how a responsible for-profit business would operate.

Rent paid by a nonwater-dependent use must always be greater than what a water-dependent use would pay. When leasing for a nonwater-dependent use, the department must also calculate the rent a water-dependent use would pay for the site. If the result according to the water-dependent rent formula is greater than the rent otherwise determined for the nonwater-dependent use, then the rent for the nonwater-dependent use must be increased to be higher.

Rent for use of fill which the state owns and has a right to charge for should also be based on fair market value, as provided in RCW 79.90.480. SEE ALSO: Fill.

Fair market rent must also be charged for improvements which the state owns and are to be used by the lessee. SEE ALSO: Improvements.

NONWATER-DEPENDENT USES: RENT INVOLVING WATER-DEPENDENT USES

Discussion on nonwater-dependent uses: rent involving water-dependent uses

If a nonwater-dependent use is conducted together with or in the same space as a water-dependent use, or if a lease for a water-dependent use is instead used for nonwater-dependent activities, the rent must account for both uses. SEE ALSO: Water-dependent uses.

O

Outfalls

Discussion on outfalls

An outfall is any pipe or structure that discharges treated or untreated industrial or municipal wastewater or stormwater which directly or indirectly impacts state-owned aquatic lands. Outfalls are one form of linear project, of utility line, and of nonwater-dependent use. SEE ALSO: Linear projects; Utility lines; Nonwater-dependent uses.

Outfalls are one of the most serious threats to environmental quality on state-owned aquatic lands. Outfall discharges commonly contain toxic materials that accumulate in the sediments of tidelands, shorelands, and bedlands. These discharges may also contain non-toxic but still harmful elements such as excessive nutrient loads or a different temperature or salinity than receiving waters. Outfall discharges can cause short- and long-term habitat damage and can create risks to humans and natural resources. Toxic materials especially can create financial liability to the state.

Examples of water-dependent uses often affected by outfalls include:

- Commercial and recreational shellfish harvesting.
- Commercial and recreational bottom fishing.
- Aquaculture.
- Swimming or other public access and recreational activities.

SEE ALSO: Water-dependent uses; Shellfish; Aquaculture; Public use and access.

Because of the potentially severe consequences of outfall discharges on aquatic resources, the department needs to closely scrutinize outfalls that occupy state-owned aquatic lands, and also, whenever possible, those that discharge onto these lands even if the outfall is located away from them. This scrutiny must include careful consideration of alternative means of managing outfalls and similar point sources of pollution.

The department will always seek to reduce the adverse environmental impacts of outfall discharges and other point sources to state-owned aquatic lands, and eventually to eliminate all such impacts. This does not necessarily require the removal of outfalls from state-owned aquatic lands, if the adverse environmental impacts of these outfalls can be sufficiently reduced or eliminated.

For existing outfalls located on state-owned aquatic lands, the department should take all opportunities to reduce or eliminate adverse environmental impacts. For outfalls proposed to be located on state-owned aquatic lands, the department will require all appropriate steps to prevent or minimize adverse environmental impacts. For all outfalls and other point sources, regardless of location, the department should seek to convince and assist regulatory agencies, local governments, and outfall users to responsibly reduce, and eventually eliminate, adverse environmental impacts to state-owned aquatic lands from sources under their control.

OUTFALLS: ALTERNATIVES TO OUTFALLS

Discussion on outfalls: alternatives to outfalls

Because of the potentially serious threats posed by outfalls to environmental quality on state-owned aquatic lands, the department will require consideration of alternative means of reducing or eliminating adverse environmental impacts from outfalls to state-owned aquatic lands. Review of a proposed

or renewing outfall must include, through the SEPA or NEPA process or other processes, evaluation of alternatives which may result in lesser or no significant adverse environmental impacts. These alternatives may include means to reduce or eliminate toxic chemicals or other environmentally harmful elements in discharges, or to avoid entirely the need for discharging onto state-owned aquatic lands.

Harmful elements in discharges might be reduced or eliminated through more thorough treatment before discharging, altering or eliminating some production processes, reducing net effluent volumes, or more aggressively separating waste and reusable materials. Possible alternatives which might reduce or avoid entirely the need for outfalls onto aquatic lands include increased water conservation; increased use of infiltration galleries; reuse of waste water and storm water as industrial coolant water, aquifer regeneration, and use of treated water for golf courses, other non-food irrigation, toilets in large office or commercial buildings, and other non-drinking purposes.

This analysis must consider all such alternatives which are scientifically valid and consistent with applicable laws and regulations, and must consider impacts of the outfall for its entire potential existence and operation and for as long as impacts may persist. Where hydrogeologically, environmentally, and economically feasible, the department's preferred alternative will be upland disposal.

OUTFALLS: REGULATORY ISSUES

Discussion on outfalls: regulatory issues

The department should always seek to coordinate with federal, state, and local agencies regarding their outfall permitting and planning, and especially to seek opportunities to address its interests regarding outfalls early in these efforts. It is essential that the department learn about outfall

proposals and notify regulatory agencies and outfall proponents of its interest in a proposed outfall, as well as in planning related to outfalls, at the earliest possible time in the process. SEE ALSO: Regulatory agencies and permits.

Staff should work closely with appropriate SEPA and NEPA staff to ensure that notices are identified and that preliminary comments are provided at the earliest possible time in the process. Also, staff must maintain close contact with other agencies and local governments responsible for or knowledgeable about in-water construction permits, JARPA applications, NPDES and wastewater permits, hydraulic project permits, salmon habitat restoration, public works proposals, critical area ordinances, and similar efforts which may relate to outfalls. Staff should also monitor revisions of local comprehensive plans, shoreline management master programs, and similar planning processes which may lead to increased wastewater or stormwater discharge, as well as plans for industrial sites or port expansions. This effort should help reduce conflicts with other interested parties, as well as ensure increased protection for the natural resources managed by the department. SEE ALSO: State Environmental Policy Act; National Environmental Policy Act; Aquatic land use planning.

To properly address outfalls, the land manager or the lead staff for the department on the outfall must coordinate with many other agencies on Section 404/401 permits, Coastal Zone Management consistency determinations, shoreline substantial development permits, National Pollution Discharge Elimination System permits, water right decisions and similar actions. Ideally, staff should begin coordinating with the Department of Ecology at least 18 months before an existing NPDES permit is up for review. In all cases, the department is committed to meeting the Department of Ecology's watershed-based cycle for reviewing NPDES permits.

The department should coordinate with the Department of Ecology (or the Environmental Protection Agency, regarding

federal facilities) to obtain and analyze information from monitoring, audits or other reviews relevant to an outfall. The department will consider participating in EPA and Ecology compliance inspections, or contract with them to review compliance with the department's proprietary conditions.

If, when in the field, staff identify potential regulatory violations which may affect any state-owned aquatic lands, they must bring these to the immediate attention of the appropriate regulatory staff. Immediate notification and documentation is important to protect the environment and for later review of outfall authorizations, including compliance with regulatory permits and the department's easements. If possible, staff should conduct a joint inspection with regulatory staff. If not possible, a formal request for the regulatory agency inspection should be submitted. Copies of such requests and the results of inspections should be forwarded to the Division.

OUTFALLS: RENT

RCW 79.90.465: Definitions.

(10) "Public utility lines" means pipes, conduits, and similar facilities for distribution of water, electricity, natural gas, telephone, other electronic communication, and sewers, including sewer outfall lines.

RCW 79.90.470 Aquatic lands -- Use for public utility lines -- Use for public parks or public recreation purposes -- Lease of tidelands in front of public parks.

The use of state-owned aquatic lands for public utility lines owned by a governmental entity shall be granted without charge by an agreement, permit, or other instrument if the use is consistent with the purposes of RCW 79.90.450 through 79.90.460 and does not obstruct navigation or other public uses. Use for public parks or public recreation purposes shall be granted without charge if the aquatic lands and improvements are available to the general public on a first-come, first-served basis and are not managed to produce a profit for the operator or a concessionaire. The

department may lease state-owned tidelands that are in front of state parks only with the approval of the state parks and recreation commission. The department may lease bedlands in front of state parks only after the department has consulted with the state parks and recreation commission.

Discussion on outfalls: rent

Government entities will receive easements for outfalls free of charge, as long as they meet the same standards for being installed in the first place. The easement still must include terms to provide for navigation and commerce, ensure environmental protection, and provide for the department's other statutory obligations and the public benefits of state-owned aquatic lands. Note that a “public utility line” is granted a free easement only if it is actually owned by a government; that is, lines that serve the general public but are owned by a private company require full payment. SEE ALSO: Utility lines.

Rent for a private outfall will be charged as for other nonwater-dependent uses of state-owned aquatic lands. Rent should be charged for any and all state-owned aquatic lands affected by the outfall, including any necessary mixing zone or other lands which are encumbered by the discharge so that other current or potential uses are restricted or eliminated. SEE ALSO: Nonwater-dependent uses.

The department may provide financial incentives if an outfall proponent voluntarily reduces the impacts of an outfall significantly below all applicable standards — for example, by providing zero discharge of bioaccumulative chemicals of concern. Final determination of rents, payments, costs and other values may be negotiated between the department and the outfall proponent. All such values must still be consistent with the goal of gaining full value for the public, but some or all of that value may take the form of environmental benefits which are in addition to those required by any applicable regulatory standards.

OUTFALLS: REVIEW AND ANALYSIS OF OUTFALLS

Discussion on outfalls: review and analysis of outfalls

This discussion of outfall reviews and analysis is in addition to the environmental review and analysis for all uses of state-owned aquatic lands. SEE ALSO: Environmental protection.

The department will prioritize the review of new and renewing use authorizations for outfalls based on the degree of risk of the discharge to state-owned aquatic lands. For existing or proposed outfalls which create higher environmental risks to state-owned aquatic lands, the department will require a greater level of review and analysis before granting authorization and will impose stronger conditions on that authorization to manage or minimize the risks.

Examples of outfalls which should be viewed as creating a higher risk for environmental damage include those outfalls, or operations which discharge through an outfall, that:

- Discharge untreated or unknown effluent.
- Have potential to discharge toxic chemicals, bioaccumulative chemicals of concern, or polyaromatic hydrocarbons.
- Have a higher potential to disturb native habitat and species, reduce species abundance and biodiversity, or reduce biological productivity in general.
- Have a higher potential to restrict other uses of state-owned aquatic land.

In general, the following are common examples of high risk outfalls or operations which may discharge through an outfall:

Chemical processing

Aluminum smelters

Oil refineries

Pulp and paper mills and processing

Microchip etching and other high-tech hardware manufacturing

Print shops and newspapers

Boat manufacturers and shipyards

Marinas

In general, the following are common examples of lower risk outfalls or operations which might discharge through an outfall:

Fruit or meat processors and packers which discharge only biodegradable matter

Co-generation plants

Outfalls which discharge cooling water only, without causing significant temperature or salinity changes

Operations with high quality treatment systems

Municipal sewage and stormwater facilities with old or outdated treatment systems or insufficient maintenance should be treated as high risk. If an improved treatment system is proposed in association with a new outfall, it may be low risk. Outfalls which have been abandoned, have no

necessary permits, or otherwise have no documented source should be treated as high risk to state-owned aquatic lands due to the uncertainty of their impacts.

The department should focus its resources on the review of new and soon-to-expire existing use authorizations for higher risk outfalls. In fact, the department should seek to be involved in decisions on high risk outfalls that impact state-owned aquatic lands regardless of whether the outfall itself is located on state-owned aquatic lands. Executive Management should be involved early in the deliberations on all proposed high risk outfalls – when possible, even before formal applications are made.

An environmental assessment must be completed before any outfall is authorized. To be most effective, the department must be involved in the early stages of permitting and environmental review so that concerns regarding environmental risks can be incorporated into required studies and environmental assessments. The department should also review and comment on all scoping notices related to outfalls that impact state-owned aquatic lands to help shape these environmental assessments. A proponent may use an environmental assessment generated for or by an environmental regulatory agency if the information in that assessment addresses the department's proprietary needs and the issues relevant to a use authorization. SEE ALSO: Regulatory agencies and permits.

The department should require cumulative impacts analysis when a new or renewed outfall is proposed in an area documented to have experienced high environmental stress, as determined by the department. Examples of environmental stresses include a decline of an important commercial species, increased Department of Health restrictions on commercial shellfish harvesting, changes in native aquatic fauna or flora, or fish kills. The cumulative impact analysis must be submitted to, and found acceptable by, the department prior to issuing a use authorization. The best way to assure that a cumulative impacts analysis occurs

is to coordinate early in the process with the Department of Ecology. The department can avoid criticism by voicing concerns about such issues early in the regulatory process.

The department will make the final determinations of the kind and amount of discharge from an outfall, the adverse environmental impacts caused or potentially caused by the discharge, and the significance of those impacts, as these relate to a use authorization granted by the department for the outfall. Impacts include all direct impacts and all substantially related indirect impacts resulting from discharges from the outfall. This is the case regardless of any other authorities or agencies which may make separate determinations. At the same time, the department should always seek to cooperate with federal, state and local environmental regulatory agencies to facilitate joint review of outfalls.

When necessary, the department may require impact studies. The applicant must pay all costs, including costs incurred by the department, for studies or review of outfalls, discharges, and their impacts.

OUTFALLS: USE AUTHORIZATIONS FOR OUTFALLS

Discussion on outfalls: Use authorizations for outfalls

This guidance on outfall authorizations is in addition to guidance on all use authorizations. SEE ALSO: Use authorizations.

For existing or proposed outfalls which create higher environmental risks to state-owned aquatic lands, the department will impose stronger conditions on that authorization to manage or minimize the risks. If adequate scientific data regarding the impacts of an outfall does not

exist or is uncertain, the department will be more cautious about granting authorization for that outfall and may defer or impose conditions on that authorization until such data does exist.

As a nonwater-dependent use, outfalls will not be permitted to expand or be established in new areas except in circumstances where they are compatible with water-dependent uses occurring in or planned for the area. It may be acceptable to authorize such an outfall if the impacts can be satisfactorily mitigated. When an already existing outfall is not compatible with water-dependent uses occurring in or planned for an area, the department will prioritize efforts to reduce or eliminate adverse environmental impacts from that outfall. SEE ALSO: Nonwater-dependent uses.

As with all uses of state-owned aquatic lands, the department will require mitigation for any significant adverse environmental impacts caused by an outfall, as a condition of granting a use authorization. Because of the potentially severe environmental effects of outfalls, mitigation may result in significant changes in an applicant's proposal. Mitigation must be conducted in accordance with the department's guidance on mitigation on state-owned aquatic lands. The proponent of an outfall will bear the burden of demonstrating that the impacts to the state-owned aquatic lands, including cumulative impacts, will be avoided, minimized, or otherwise effectively mitigated. SEE ALSO: Environmental protection.

Outfalls should be compatible with shoreline and substrate stability, and should avoid earthquake and slide zones, if a potential earthquake or slide would cause any additional adverse impacts from the outfall. This determination should be based on data or maps provided by the U.S. Geologic Service or other appropriate source.

Even more than for most other use authorizations, the department should require monitoring of the discharges and

impacts of all outfalls receiving a use authorization. The monitoring conditions required by a regulatory agency may be considered sufficient if they monitor the functions important to the department and meet the department's needs regarding the environmental health of the state-owned aquatic lands. The outfall proponent will be responsible for the monitoring costs. SEE ALSO: Use authorizations.

The department will review outfall proposals in light of the plans and ordinances of other agencies and local governments. A proposed outfall must be consistent with all applicable plans and ordinances.

The outfall proponent will be responsible for using best management practices, to be determined by the circumstances of each outfall. Other conditions may be required as appropriate.

The department usually will not approve a new or renewed use authorization for an outfall which causes significant adverse environmental impacts to state-owned aquatic lands which are designated as an aquatic reserve or critical area. These include aquatic reserves, broadly defined, established by the department or other agencies for the purpose of preserving or protecting environmental resources and values in a given area, and critical areas identified by local shoreline management master programs, growth management plans, or similar planning processes. SEE ALSO: Reserves, aquatic; Aquatic land use planning.

OUTFALLS: USE AUTHORIZATION TERMS

Discussion on outfalls: use authorization terms

The length of term of a use authorization for an outfall will depend on the likely impacts and risks of the outfall. SEE ALSO: Use authorizations.

A short term lease (less than five years) should be used when:

- Risks are not completely assessed or are expected to increase over time;
- The outfall proponent is under a commitment to reduce risks, and oversight is required to ensure compliance;
- The quality or quantity of the discharge is expected to change significantly in the short-term; or
- Land uses in the area of the outfall are expected to change significantly in the short-term.

A longer term lease may be used when:

- The conditions above do not apply;
- Outfall discharges and impacts are considered low risk; and
- No history of lease violations has occurred from the outfall or by the outfall proponent.

A longer term lease is up to 30 years or the life of the facility, whichever is shorter. If a facility has an expected life longer than 30 years, it may be possible to renew the lease upon expiration. However, it should be made clear to applicants receiving a longer term lease that the department's goal is to eliminate all adverse environmental impacts from discharges from all outfalls and that subsequent lease negotiations will strive to achieve that goal.

Use authorizations for new or existing outfalls must have re-opener provisions at least every ten years. The department should, whenever possible, align its re-opener clauses in these use authorizations to coincide with the time frames of regulatory processes. Use authorizations will be conditioned upon receiving progress reports from the lessee on their plans to reduce discharges, including the potential to ultimately relocate or remove the outfall altogether. If longer terms are to be issued, the lease or easement must allow for the department to reopen the lease when NPDES permits are reissued to evaluate discharges and conditions of the outfall. If, at the re-opener, the performance record for either the conditions of the use authorization or any required regulatory permit is less than satisfactory, the department may terminate the use authorization. SEE ALSO: Regulatory agencies and permits.

P

Permits

SEE: Regulatory agencies and permits.

Piers and wharfs

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(6) Multiple use of existing pier and wharf facilities will be encouraged, to reduce the need for adding new facilities.

WAC 332-30-142: Piers.

(1) Piers within harbor areas will be authorized as needed to serve the needs of commerce and navigation but may not extend beyond the outer harbor line.
(2) No piers or other fixed structures are permitted within waterways established under RCW 79.01.428.
(3) Multiple use of pier and wharf facilities will be encouraged, rather than the addition of new facilities.
(4) Piers on first class tidelands and shorelands will be permitted as needed for commercial and residential purposes without any restriction as to frequency; however, the length will be restricted as needed so as not to unduly interfere with navigation. The type of structure may be restricted so as to minimize impact on environment and other users.
(5) Public and common use residential piers may be considered on public use - general beaches so designated on selected second class tideland and shoreland tracts.
(6) No piers or structures of any kind are permitted on public use - wilderness beaches so designated on selected second class tideland and shoreland tracts.

(7) Piers may be approved for installation on second class tideland and shoreland tracts not designated as public use beaches. They must follow the pier spacing and length standards.
(8) Pier spacing and length standards:
  (a) New piers intended for resort and recreational use on second class tidelands and shorelands extending beyond the line of extreme low tide or line of navigability may be authorized if more than five times the pier length from any other pier on either side.
  (b) Leases covering such installations may require that the owner of the pier allow the adjacent shoreline owners to utilize the pier for loading and unloading purposes.
  (c) Unauthorized existing piers will be considered as new piers and offered leases which may provide for joint use.
  (d) New piers should not extend seaward further than immediately adjacent similar structures except in harbor areas where harbor lines control pier lengths.
(9) Pier design criteria:
  (a) Floating piers minimize visual impact and should be used where scenic values are high. However, floating piers constitute an absolute impediment to boat traffic or shoreline trolling and should not be used in areas where such activities are important and occur within the area of the proposed pier. Floating piers provide excellent protection for swimmers from high-speed small craft and may be desirable for such protection. Floating piers interrupt littoral drift and tend to starve down current beaches. This effect should be considered before approval.
  (b) Pile piers have a greater visual impact than do floating piers, and their use should be minimized in areas where scenic values are high. Pile piers cause less interference with littoral drift and do provide a diverse habitat for marine life. In areas where near-shore trolling is important, pile piers should be used with bents spaced 16 feet apart and with a minimum of 5 feet clearance above extreme high tide. Single pile bents are preferred where possible.

Discussion on piers and wharfs

Piers and wharfs must receive authorization from the department before being installed on state-owned aquatic

lands. Piers and wharfs are generally part of a water-dependent use. However, if nonwater-dependent activities are taking place on or are proposed for a pier or wharf, that use must meet the standards for authorizing nonwater-dependent uses and the lessee must pay rent appropriate to nonwater-dependent uses for that area of the pier or wharf. SEE ALSO: Use authorizations; Water-dependent uses.

Navigation is a major concern with piers and wharfs. The builder of a pier or wharf must not infringe on navigation in the middle of the waterbody nor for vessels approaching neighboring piers and wharfs. SEE ALSO: Navigation.

Private recreational docks do not require authorization from the department as long as they meet certain conditions. SEE ALSO: Recreational docks, private.

Pipelines

SEE: Linear projects; Utility lines.

Pollution laws

Discussion on pollution laws

Many activities have resulted in the release of toxic chemicals and other pollutants that accumulate in aquatic sediments and may pose a threat to human health and the environment. The public owns the bedlands at the deepest part of bays and rivers, so these pollutants usually end up on state-owned aquatic lands. Public concern over toxic chemicals in the environment led to the passage of several federal and state laws that regulate the discharge and cleanup of pollution. SEE ALSO: Environmental protection.

POLLUTION LAWS: ADDRESSING POLLUTION CONCERNS

Discussion on pollution laws: addressing pollution concerns

Many uses of state-owned aquatic lands over the past 100-plus years have caused pollution and contamination. It is also possible for activities on privately-owned aquatic lands or uplands to cause contamination that eventually winds up on state-owned aquatic lands. It is critical that department staff stay apprised of activities and proposed actions which may result in new releases of contamination to state-owned aquatic lands or change the ownership or liabilities for clean-up of the contamination. Staff should keep this in mind especially with regard to:

- Shipyards
- Marinas
- Outfalls
- Industrial facilities
- Waste water treatment facilities
- Storm water discharges

It is critical to address pollution concerns both at the beginning and end of a lease. SEE ALSO: Use authorizations.

If there is reason to suspect contamination of sediments on state-owned aquatic lands proposed to be leased or where the lease will shortly expire, the department should require the applicant or lessee to sample for contamination according to Ecology's MTCA sediment quality standards. If sampling shows violations of these standards, it may trigger various requirements under MTCA. One "hot" sample does not trigger MTCA, but may be reason to conduct further sampling to identify the extent of contamination. The department must attend to these issues, especially when

finalizing a lease, to identify whether there is contamination for which the lessee should be held responsible.

Even if a project would not cause pollution itself, but is proposed to occur in a contaminated area, the project should be carefully reviewed for its potential to affect the state's liability.

The Department of Ecology has the authority to require the department to take action to clean up contamination under MTCA when the sediment quality standards are exceeded. As the proprietary land manager, the department can require similar action from a lessee if provided for in the lease, even if MTCA is not triggered.

In recent years, the department and the Department of Ecology have developed a memorandum of agreement concerning contaminated sediment source control, cleanup and disposal. A key purpose of the agreement is to ensure the effective integration of the state's regulatory and proprietary authorities for the prevention, investigation, and cleanup of contaminated sediment sites. The agreement is designed to establish clear and simple procedures to ensure continued communication and close cooperation between Ecology and the department during implementation.

Under the agreement with Ecology, the department should be notified when discharge authorizations, rule development, and other actions Ecology may undertake could affect state-owned aquatic lands. Land managers should know the regional Ecology staff person responsible for implementing the agreement.

If staff have reason to suspect the potential for significant and imminent hazardous discharges on or near state-owned aquatic lands, they should contact the appropriate Ecology staff. Also, staff should make a site visit, with the Ecology staff if possible, and investigate concerns related to habitat quality, water quality and sediment contamination. SEE ALSO: Regulatory agencies and permits.

POLLUTION LAWS: CLEANUP OF POLLUTANTS

Discussion on pollution laws: cleanup of pollution

Many laws apply to contamination of sediments on state-owned aquatic lands. The most important to the department are CERCLA and MTCA. SEE ALSO: Sediments.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended by the Superfund Amendments and Reauthorization Act (SARA) in 1994, is a complex federal statute aimed at cleaning up contaminated sites. Regarding state-owned aquatic lands, this can include tidelands, shorelands, and bedlands where hazardous substances have been deposited, spilled, or otherwise moved by tidal action or water transport. CERCLA requires owners and operators to notify the Environmental Protection Agency (EPA) of any release or threatened release of hazardous substances. The EPA is empowered to investigate any such release or threatened release, to respond immediately to emergency situations and to clean up identified sites. CERCLA also creates a federal fund to pay a portion of certain clean-up costs (hence "Superfund"). Under CERCLA, all parties associated with a contaminated site, including the land users, land owners, and anyone who ever disposed of material there – together known as potentially responsible parties – are each fully liable for cleanup, regardless of fault.

The Model Toxics Control Act (MTCA) is a state law modeled on CERCLA, and gives the Department of Ecology authority similar to the EPA, and additionally includes petroleum in the definition of hazardous substances. This law also imposes liability regardless of fault on all potentially liable parties (basically the same concept as potentially responsible parties).

Under MTCA, Ecology has established sediment quality standards based on numerical criteria for chemical concentration levels. These criteria are based on a complex statistical method, and currently apply only to marine and estuarine waters. At present, there are no sediment management standards for freshwater.

If sampling shows violations of these standards, it may trigger various requirements under MTCA. One "hot" sample does not trigger MTCA, but may be reason to conduct further sampling to identify the extent of contamination. The department must attend to these issues, especially when finalizing a lease, to identify whether there is contamination for which the lessee should be held responsible.

Under these contamination cleanup laws, the state could be held potentially responsible for the entire cleanup of any toxic chemicals found on land it manages, even if it did not cause the pollution. If the company that caused the contamination no longer exists, the cost of the cleanup may have to be shared by all other potentially liable or potentially responsible parties at or surrounding the site under MTCA or CERCLA, respectively. Staff should always seek to address pollution concerns, both to better ensure environmental protections and to avoid liability to the state.

As of June 1999, EPA has taken actions against the department at three Superfund sites. The department and EPA have negotiated a framework agreement that covers six sites. As of 1996, Ecology counted 49 CERCLA and MTCA sites in Puget Sound, not all of which are on state-owned aquatic lands. There are additional sites in Lake Union, the Columbia River, and elsewhere across the state. Ecology has estimated that a typical cleanup on an aquatic land site costs from as little as a few hundred thousand dollars for a small site to tens of millions of dollars for a large site.

The state of Washington, by virtue of owning aquatic lands, has been identified as a potentially responsible party for some contaminated sites on state-owned aquatic lands. The department shares the responsibility for cleanup with others who contributed to the problem and may or may not ultimately be held financially liable. As a state agency, the department is not liable under MTCA. However, as the public steward of state-owned aquatic lands, the department has a vital interest in ensuring they are free of contamination, irrespective of liability.

POLLUTION LAWS: WATER POLLUTION CONTROL

Discussion on pollution laws: water pollution control

The federal Clean Water Act sets up the basic structure to regulate discharges of pollutants to waters of the United States. The Department of Ecology is the state agency which has been delegated the responsibility for administering portions of the Act. Ecology also administers the State Water Pollution Control Act and its permits. Collectively, these laws regulate discharges of pollutants to state waters.

Section 404 of the Clean Water Act is the principal federal regulatory program protecting remaining wetland resources. Under Section 404, the U.S. Army Corps of Engineers administers a permitting program for the discharge of dredged and fill materials into the waters of the United States, including wetlands.

Under Section 401 of the Clean Water Act, a water quality certification is required of any applicant for a federal license or permit to conduct any activity that may result in discharge into surface waters. This includes discharge of dredge and fill material into water or wetlands. This permit is frequently associated with, and ancillary to, Section 404 and Section 10

permits, National Pollution Discharge Elimination System permits, and dredging/disposal permits under Puget Sound Dredge Disposal Analysis, and similar authorities. The Department of Ecology has a checklist for section 401 certification. Staff should request a copy of this checklist for each applicant with potential for significant impacts to state-owned aquatic lands.

Section 303(d) of the Clean Water Act contains a program for cleaning up waters by requiring states to establish waterbody specific limits for pollutants, known as setting the "total maximum daily load" (TMDLs). A TMDL establishes limits on pollutants that can be discharged to the waterbody and still allow state water quality standards to be met. The TMDL program requires states to determine which waters are not meeting water quality standards. The states then prioritize these waters for cleanup, based on the severity of pollution and the intended use of the area.

In these priority waters, the Department of Ecology determines how much pollution the water can handle and still meet water quality standards. This pollution load, or TMDL, is then divided among the polluters that affect the water body. Experiments with pollution trading among cities may result in over-polluting certain stretches of state-owned aquatic lands in rivers. This "trading" may or may not be acceptable to meet the TMDL and protect state-owned aquatic resources. Land managers should ensure that state interests are known and considered in such cases.

Under Section 303(d) of the Clean Water Act, Ecology is required every two years to prepare a list of estuaries, lakes, and streams that fall short of state surface water quality standards, and that are not expected to improve within the next two years. There are no permits associated with the TMDL program.

Ports and Port Management Agreements

RCW 79.90.475: Management of certain aquatic lands by port district--Agreement--Rent--Model management agreement.

Upon request of a port district, the department and port district may enter into an agreement authorizing the port district to manage state-owned aquatic lands abutting or used in conjunction with and contiguous to uplands owned, leased, or otherwise managed by a port district, for port purposes as provided in Title 53 RCW. Such agreement shall include, but not be limited to, provisions defining the specific area to be managed, the term, conditions of occupancy, reservations, periodic review, and other conditions to ensure consistency with the state Constitution and the policies of this chapter. If a port district acquires operating management, lease, or ownership of real property which abuts state-owned aquatic lands currently under lease from the state to a person other than the port district, the port district shall manage such aquatic lands if:

(1) The port district acquires the leasehold interest in accordance with state law, or

(2) the current lessee and the department agree to termination of the current lease to accommodate management by the port. The administration of aquatic lands covered by a management agreement shall be consistent with the aquatic land policies of chapters 79.90 through 79.96 RCW and the implementing regulations adopted by the department. The administrative procedures for management of the lands shall be those of Title 53 RCW. No rent shall be due the state for the use of state-owned aquatic lands managed under this section for water-dependent or water-oriented uses. If a port district manages state-owned aquatic lands under this section and either leases or otherwise permits any person to use such lands, the rental fee attributable to such aquatic land only shall be comparable to the rent charged lessees for the same or similar uses by the department: PROVIDED, That a port district need not itemize for the lessee any charges for state-owned aquatic lands improved by the port district for use by carriers by water. If a port leases state-owned

aquatic lands to any person for nonwater-dependent use, eighty-five percent of the revenue attributable to the rent of the state-owned aquatic land only shall be paid to the state. Upon application for a management agreement, and so long as the application is pending and being diligently pursued, no rent shall be due the department for the lease by the port district of state-owned aquatic lands included within the application for water-dependent or water-oriented uses. The department and representatives of the port industry shall develop a proposed model management agreement which shall be used as the basis for negotiating the management agreements required by this section. The model management agreement shall be reviewed and approved by the board of natural resources. [1984 c 221 § 6.]

WAC 332-30-103: Purpose and applicability.

(1) This chapter [all aquatic resources WACs] applies to all state-owned aquatic lands. Except when specifically exempted, this chapter applies to aquatic lands covered under management agreements with port districts (WAC 332-30-114).

(2) These regulations do not supersede laws and regulations administered by other governmental agencies covering activities falling under their jurisdiction on these same lands.

(3) These regulations contain performance standards as well as operational procedures to be used in lease management, land use planning and development actions by the department and port districts. These regulations shall apply each to the department and to the port districts, when such districts manage aquatic lands as the result of management agreements, and neither entity shall impose management control over the other under these regulations except as provided for in such management agreements.

WAC 332-30-114: Management agreements with port districts.

By mutual, formal, written agreement the department may authorize a port district to manage some or all of those aquatic lands within the port district meeting the criteria stated in subsection (2) of this section. The port district shall adhere to the aquatic land management laws and policies of the state as specified in chapters 79.90 through 79.96 RCW. Port district management of state aquatic lands shall be consistent with all

department regulations contained in chapter 332-30 WAC. These requirements shall govern the port's management of state aquatic lands. The administrative procedures used to carry out these responsibilities shall be those provided for port districts under Title 53 RCW.

(1) Interpretations. Phrases used in legislation (RCW 79.90.475) providing for management agreements with ports shall have the following interpretation:

(a) "Administrative procedures" means conducting business by the port district and its port commission.

(b) "Aquatic lands abutting or used in conjunction with and contiguous to" means state-owned aquatic lands which share a common or coincident boundary with an upland parcel or in the event the state aquatic land does not attach to an upland parcel (i.e., bedlands, harbor areas, etc.), this term shall include the aquatic land adjacent to and waterward of the port owned or controlled aquatic parcel which has a common or coincident boundary to the upland parcel.

(c) "Diligently pursued" means such steady and earnest effort by the port district and the department which results in the resolution of any deficiencies preventing the issuance of a management agreement to the port.

(d) "Leasehold interest" means the benefits and obligations of both the lessor and lessee resulting from a lease agreement.

(e) "Model management agreement" means a document approved by the board of natural resources to be used for all individual management agreements with port districts.

(f) "Operating management" means the planning, organizing, staffing, coordinating, and controlling for all activities occurring on a property.

(g) "Otherwise managed" means having operating management for a property.

(h) "Revenue attributable" means all rentals, fees, royalties, and/or other payments generated from the use of a parcel; or the most likely amount of money due for the use of a parcel as determined by procedures in chapter 332-30 WAC, whichever is greater.

(2) Criteria for inclusion. State-owned parcels of aquatic lands, including those under lease or which may come under lease to a port, abutting port district uplands may be included in a management agreement if criteria set forth in RCW 79.90.475 are

met and if there is documentation of ownership, a lease in good standing, or agreement for operating management, in the name of the port district for the upland parcel.
(3) A model management agreement and any amendments thereto shall be developed by the department and representatives of the port industry. The board of natural resources shall review and approve the model management agreement and any subsequent amendments.
(4) Processing requests. The following application requirements, review procedures, and time frame for responses involved in the issuance of a management agreement to a port district shall apply.

(a) Application requirements. The following items must be submitted to the department by the port district in order for its request to be an application for a management agreement:

(i) A copy of a resolution of the port commission that directs the port district to seek a management agreement;

(ii) An exhibit showing the location of and a description adequate to allow survey for each parcel of state-owned aquatic land to be included in the agreement, plus sufficient information on abutting port parcels to satisfy the requirements of subsection (2) of this section;

(iii) The name, address, and phone number of the person or persons that should be contacted if the department has any questions about the application.

(b) Time frames for responses:

(i) Within thirty days of receipt of an application, the department shall notify the port district if its application is complete or incomplete;

(ii) Within thirty days of receipt of notification by the department of any incompleteness in their application, the port district shall submit the necessary information;

(iii) Within ninety days of receipt of notification by the department that the application is complete, the port district and department shall take all steps necessary to enter into an agreement.

Discussion on ports and Port Management Agreements

The department and port districts sometimes co-manage state-owned aquatic lands. The contractual vehicle for the management of these lands is the Port Management Agreement (PMA). The Division has primary responsibility for dealing with ports and PMAs, but should receive assistance from the Regions.

A PMA is a written agreement between the department and a port district authorizing the port to manage, on behalf of the state, some or all of the state-owned aquatic lands within the port district. These lands must directly abut or be contiguous with a parcel of property owned, leased, or otherwise controlled by the port district. The PMA grants day-to-day management control and responsibility over these lands to the port. The department still has an underlying interest in and responsibility for managing these aquatic resources, including protecting the environment on these lands, in accordance with its statutory obligations.

There are 76 ports in Washington. As of 1999, 29 have signed PMAs with the state and three have applied for a PMA. Of these, 12 have the 1995 model agreement, 17 are managed under the 1984 model, and three are pending. The major differences between the 1995 agreements and the 1984 agreements are that 1984 agreements do not have a termination date and are unspecific as to liability for environmental damage. Ports also interpret the 1984 agreement as allowing them to unilaterally add certain areas to the agreement.

1995 PMAs

Port of Bellingham
Port of Coupeville
Port of Edmonds
Port of Friday Harbor
Port of Ilwaco
Port of Olympia
Port of Port Townsend
Port of Poulsbo
Port of Seattle
Port of Shelton
Port of Wahkiakum, Dist. #2
Port of Woodland

1995 PMAs pending

Port of Everett

Port of Kalama
Port of Silverdale

1984 PMAs

Port of Allyn	Port Dist. #1, Klickitat County
Port of Anacortes	Port of Longview
Port of Bremerton	Port of Port Angeles
Port of Brownsville	Port of Skagit County
Port of Camas Washougal	Port of Tacoma
Port of Chinook	Port of Vancouver
Port of Clarkston	Port of Whitman County
Port of Grays Harbor	Port of Willapa Harbor
Port of Kingston	

Ports are required to manage state-owned aquatic lands under a PMA "consistent with the aquatic land policies of chapters 79.90 through 79.96 RCW and the implementing regulations [Chapter 332-30 WAC] adopted by the department." A PMA is similar to a lease in many respects. It is, however, more than just a lease in that it serves as a memorandum of understanding between the department and the port. Therefore, oversight of the PMA requires a considerably different role than that of lease manager.

Any new PMA must use the 1995 model Port Management Agreement, unless it is subsequently updated by the Board of Natural Resources. This means using the model agreement in its entirety. Deviations from the model agreement require approval from Executive Management in advance of any commitments.

Once the PMA is in place, the port has the responsibility for negotiating leases in the areas covered by a PMA. However, acting on behalf of the public landowner, the department oversees port and lessee compliance with the conditions of the PMA. To do this, the department can take advantage of joint inspections conducted by regulatory agencies by accompanying those agencies or by requesting copies of their inspection reports and any photographs.

If the port approves a lease for a water-dependent use, the state does not receive any money from that lease. If the lease is for a nonwater-dependent use, however, the port must return to the state 85 percent of the rent attributed to the state-owned aquatic lands. This does not include any rent attributable to improvements and other services performed by the port for the tenant.

PORTS AND PORT MANAGEMENT AGREEMENTS: ROLE OF THE REGIONS

Discussion on ports and port management agreements: role of the Regions

The Division has responsibility for negotiating the PMAs and for overseeing compliance. To assist the Division, Regions should:

- Be familiar with the PMAs in their Region.
- Be familiar with the ownership boundaries of lands within a port district, both those belonging to the state and those which are owned or controlled by the port.
- Know the local port officials and staff.
- Be aware of port activities which may impact adjacent state-owned aquatic lands. For example, when in the area, check for instances of non-compliance by the ports or their lessees and for activities which could lead to contamination of sediments.
- When reviewing applications and permits, determine their location relative to PMA boundaries.
- Notify the Division of any issues or problems.

The department should keep two complete files on PMAs, one for the Region and one for the Division.

Preference rights

SEE: Use authorizations.
For preference rights in harbor areas, SEE: Harbor areas.

Preserves, aquatic

SEE: Reserves, aquatic.

Prospecting

SEE: Mining and prospecting.

Public benefits

RCW 79.90.450: Aquatic lands--Findings.
The legislature finds that state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage. The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the department of natural resources the responsibility to manage these lands for the benefit of the public. The legislature finds that water-dependent industries and activities have played a major role in the history of the state and will continue to be important in the future. The legislature finds that revenues derived from leases of state-owned aquatic lands should be used to enhance opportunities for public recreation, shoreline access, environmental protection, and other public benefits associated with the aquatic lands of the state. The legislature further finds that aquatic lands are faced with conflicting use demands. The purpose of RCW 79.90.450 through 79.90.545 is to articulate a management philosophy to guide the exercise of the state's ownership interest and the exercise of the

department's management authority, and to establish standards for determining equitable and predictable lease rates for users of state-owned aquatic lands.

RCW 79.90.455: Aquatic lands--Management guidelines.
The management of state-owned aquatic lands shall be in conformance with constitutional and statutory requirements. The manager of state-owned aquatic lands shall strive to provide a balance of public benefits for all citizens of the state. The public benefits provided by aquatic lands are varied and include:
(1) Encouraging direct public use and access;
(2) Fostering water-dependent uses;
(3) Ensuring environmental protection;
(4) Utilizing renewable resources. Generating revenue in a manner consistent with subsections (1) through (4) of this section is a public benefit.

WAC 332-30-106 Definitions.
(48) "Public benefit" means that all of the citizens of the state may derive a direct benefit from departmental actions in the form of environmental protection; energy and mineral production; utilization of renewable resources; promotion of navigation and commerce by fostering water-dependent uses; and encouraging direct public use and access; and generating revenue in a manner consistent with RCW 79.90.455.
(53) "Public trust" means that certain state-owned tidelands, shorelands and all beds of navigable waters are held in trust by the state for all citizens with each citizen having an equal and undivided interest in the land. The department has the responsibility to manage these lands in the best interest of the general public.

Discussion on public benefits

RCW 79.90.450 is the introduction to the Aquatic Lands Act, passed by the Legislature in 1984. This act sets out the most important guiding principles for managing this “finite natural resource of great value and an irreplaceable public heritage.”

The public benefits described in RCW 79.90.455 are the fundamental basis for decisions regarding state-owned aquatic lands. Each decision must be weighed with these benefits primarily in mind. While not every use of state-owned aquatic lands can always provide all of these benefits, all these benefits should be explicitly considered when deciding on a proposed use of these lands.

In particular, as the natural environment of aquatic lands is its most fragile and difficult-to-replace public benefit and as befits the term “ensure,” the department is dedicated to taking all possible measures within its authority to protect the aquatic environment. Even as the department strives to provide for the other benefits of state-owned aquatic lands, environmental protection must be in the forefront of all department decisions. SEE ALSO: Environmental protection; State-wide value; Multiple-use.

The definitions in WAC 332-30-106 tell us about more than just public benefits and public trusts; they define the customers we serve. The department manages state-owned aquatic lands “for all citizens” collectively, “with each citizen having an equal and undivided interest.” The department must manage these lands not only for those persons who wish to use these lands for individual benefit, but for “the general public” so that “all of the citizens of the state may derive a direct benefit.”

Public lands

RCW 79.01.004: "Public lands," "state lands" defined.
Public lands of the state of Washington are lands belonging to or held in trust by the state, which are not devoted to or reserved for a particular use by law, and include state lands, tidelands, shorelands and harbor areas as hereinafter defined, and the beds of navigable waters belonging to the state. Whenever used in this chapter the term "state lands" shall mean and include: School lands, that is, lands held in trust for the support of the common

schools; University lands, that is, lands held in trust for university purposes; Agricultural college lands, that is, lands held in trust for the use and support of agricultural colleges; Scientific school lands, that is, lands held in trust for the establishment and maintenance of a scientific school; Normal school lands, that is, lands held in trust for state normal schools; Capitol building lands, that is, lands held in trust for the purpose of erecting public buildings at the state capital for legislative, executive and judicial purposes; Institutional lands, that is, lands held in trust for state charitable, educational, penal and reformatory institutions; and All public lands of the state, except tidelands, shorelands, harbor areas and the beds of navigable waters.

Discussion on public lands

The term “public lands” includes state-owned aquatic lands, but the term “state lands,” as used in statute, does not,. This is important with regard to many statutes in Chapter 79.01 RCW regarding public lands in general. SEE ALSO: State-owned aquatic lands.

Public use and access

RCW 79.90.455: Aquatic lands--Management guidelines.
The management of state-owned aquatic lands shall be in conformance with constitutional and statutory requirements. The manager of state-owned aquatic lands shall strive to provide a balance of public benefits for all citizens of the state. The public benefits provided by aquatic lands are varied and include:
(1) Encouraging direct public use and access;
(2) Fostering water-dependent uses;
(3) Ensuring environmental protection;
(4) Utilizing renewable resources. Generating revenue in a manner consistent with subsections (1) through (4) of this section is a public benefit.

RCW 79.90.470 Aquatic lands -- Use for public utility lines -- Use for public parks or public recreation purposes -- Lease of tidelands in front of public parks.

The use of state-owned aquatic lands for public utility lines owned by a governmental entity shall be granted without charge by an agreement, permit, or other instrument if the use is consistent with the purposes of RCW 79.90.450 through 79.90.460 and does not obstruct navigation or other public uses. Use for public parks or public recreation purposes shall be granted without charge if the aquatic lands and improvements are available to the general public on a first-come, first-served basis and are not managed to produce a profit for the operator or a concessionaire. The department may lease state-owned tidelands that are in front of state parks only with the approval of the state parks and recreation commission. The department may lease bedlands in front of state parks only after the department has consulted with the state parks and recreation commission.

WAC 332-30-106 Definitions.

(51) "Public place" means tidelands belonging to and held in public trust by the state for the citizens of the state, which are not devoted to or reserved for a particular use by law.
(54) "Public use" means to be made available daily to the general public on a first-come, first-served basis, and may not be leased to private parties on any more than a day use basis.
(55) "Public use beach" means a state-owned beach available for free public use but which may be leased for other compatible uses.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(19) Bedlands abutting upland parks will be considered for underwater parks.
(22) Motorized vehicular travel shall not be permitted on public use tidelands and shorelands except under limited circumstances such as a boat launch ramp.

WAC 332-30-122: Aquatic land use authorization.

All requirements in this section shall apply to the department. Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to

port districts managing aquatic lands under a management agreement (WAC 332-30-114).
(2) Application review. In addition to other management considerations, the following special analysis shall be given to specific proposed uses:

(b) Public use and access.

(i) Wherever practical, authorization instruments for use of aquatic lands shall be written to provide for public access to the water.

(ii) Areas allocated for first-come, first-served public use shall not be managed to produce a profit for a concessionaire or other operator without a fee being charged.

(iii) Notice will be served to lessees of tidelands and shorelands allocated for future public use that prior to renewal of current leases, such leases will be modified to permit public use or will be terminated.

WAC 332-30-131: Public use and access.

This section shall not apply to private recreational docks. Subsections (2) and (3) of this section shall not apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114). Public use and access are aquatic land uses of state- wide value. Public access and recreational use of state-owned aquatic land will be actively promoted and protected.
(1) Access encouraged. Other agencies will be encouraged to provide, in their planning, for adequate public use and access and for protection of public use and access resources.
(2) Access grants. Aquatic Land Enhancement Account funds will be distributed to state and local agencies to encourage provision of public access to state-owned aquatic lands.
(3) Access advertised. State-owned aquatic lands particularly suitable for public use and access will be advertised through appropriate publications.
(4) No-fee access agreements. No-fee agreements may be made with other parties for provision of public use and access to state-owned aquatic lands provided the other party meets the following conditions:

(a) The land must be available daily to the public on a first-come, first-served basis and may not be leased to private parties on any more than a day-use basis.

(b) Availability of free public use must be prominently advertised by appropriate means as required. For example, signs may be required on the premises and/or on a nearby public road if the facility is not visible from the road.
(c) When the use is dependent on the abutting uplands, the managing entity must own, lease or control the abutting uplands.
(d) User fees shall not be charged unless specifically authorized by the department and shall not exceed the direct operating cost of the facility.
(e) Necessary nonwater-dependent accessory uses will be allowed in the no-fee agreement area only under exceptional circumstances when they contribute directly to the public's use and enjoyment of the aquatic lands and comply with WAC 332-30-137. Such nonwater-dependent uses shall be required to pay a fair-market rent for use of aquatic lands.
(f) Auditable records must be maintained and made available to the state.

(5) Rent reduction for access. Leased developments on state-owned aquatic lands which also provide a degree of public use and access may be eligible for a rent reduction. Rental reduction shall apply only to the actual area within the lease that meets public access and use requirements of subsection (4) of this section.

Discussion on public use and access

"Encouraging direct public use and access" is one of the key public benefits of state-owned aquatic lands that the department must strive to provide. SEE ALSO: Public benefits.

Public use and access to aquatic lands for transportation, commerce, and recreation is a basic right of Washington citizens. The department's role is to protect public access and to ensure that opportunities for public access are fully considered in aquatic lands management decisions. If areas are designated for future public use, notice must be served to lessees of tidelands and shorelands in those areas that existing leases must be modified to permit public use or they will not be renewed.

With regard to public use and access, the department has three separate but related goals:

- Preservation of natural values of aquatic resources that can be used, such as clean water for fish and for swimming, and bedlands and beaches that are ecologically healthy.
- Enhancement of access to shorelines so the public can better enjoy these natural values of aquatic resources.
- Maintenance of adequate passage for waterborne commerce and navigation.

PUBLIC USE AND ACCESS: PUBLIC PARKS

Discussion on public use and access: public parks

Public parks, such as those on piers, are especially favored uses of state-owned aquatic lands, as they provide direct public use and access to aquatic lands and also are a water-dependent use. The department will usually approve proposed public parks, so long as they do not cause significant environmental damage or present serious conflicts with other water-dependent uses, such as navigation impacts or safety concerns related to nearby industrial uses.

Use of state-owned aquatic lands are to be granted free of charge for public parks and public recreation purposes. The aquatic lands and improvements on them must be available to the public on a first-come, first-served basis, and may not be managed to produce a profit for the operator or a concessionaire. A public park may be incorporated into

another use, and the park portion will be free of rent, as long as the park is freely available to the public at all times. For example, a tenant might construct a waterfront boardwalk as part of a larger facility, as was done by the Seattle Aquarium. In this case, the tenant would pay no rent for the boardwalk portion of the aquatic land parcel, even if it financially benefits the tenant's business, as long as the boardwalk also serves as a usable and accessible public area.

Public utility lines

SEE: Utility lines.

R

Recreational docks, private

RCW 79.90.105: Private recreational docks.

The abutting residential owner to state-owned shorelands, tidelands, or related beds of navigable waters, other than harbor areas, may install and maintain without charge a dock on such areas if used exclusively for private recreational purposes and the area is not subject to prior rights. This permission is subject to applicable local regulation governing construction, size, and length of the dock. This permission may be revoked by the department upon finding of public necessity which is limited to the protection of waterward access or ingress rights of other landowners or public health and safety. The revocation may be appealed as an adjudicative proceeding under chapter 34.05 RCW, the Administrative Procedure Act. Nothing in this section prevents the abutting owner from obtaining a lease if otherwise provided by law.

WAC 332-30-144: Private recreational docks.

(1) Applicability. This section implements the permission created by RCW 79.90.105, Private recreational docks, which allows abutting residential owners, under certain circumstances, to install private recreational docks without charge. The limitations set forth in this section apply only to use of state-owned aquatic lands for private recreational docks under RCW 79.90.105. No restriction or regulation of other types of uses on aquatic lands is provided. This section shall not apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(2) Eligibility. The permission shall apply only to the following:

(a) An "abutting residential owner," being the owner of record of property physically bordering on public aquatic land and

either used for single family housing or for a multi-family residence not exceeding four units per lot.

(b) A "dock," being a securely anchored or fixed, open walkway structure visible to boaters and kept in good repair extending from the upland property, primarily used as an aid to boating by the abutting residential owner(s), and accommodating moorage by not more than four pleasure boats typical to the body of water on which the dock is located. Two or more abutting residential owners may install and maintain a single joint-use dock provided it meets all other design requirements of this section; is the only dock used by those owners; and that the dock fronts one of the owners' property.

(c) A "private recreational purpose," being a nonincome-producing, leisure-time, and discretionary use by the abutting residential owner(s).

(d) State-owned aquatic lands outside harbor areas designated by the harbor line commission.

(3) Uses not qualifying. Examples of situations not qualifying for the permission include:

(a) Yacht and boat club facilities;

(b) Houseboats;

(c) Resorts;

(d) Multi-family dwellings, including condominium ownerships, with more than four units;

(e) Uses other than docks such as launches and railways not part of the dock, bulkheads, landfills, dredging, breakwaters, mooring buoys, swim floats, and swimming areas.

(4) Limitations.

(a) The permission does not apply to areas where the state has issued a reversionary use deed such as for shellfish culture, hunting and fishing, or park purposes; published an allocation of a special use and the dock is inconsistent with the allocation; or granted an authorization for use such as a lease, easement, or material purchase.

(b) Each dock owner using the permission is responsible for determining the availability of the public aquatic lands. Records of the department are open for public review. The department will research the availability of the public aquatic lands upon written request. A fee sufficient to cover costs shall be charged for this research.

(c) The permission is limited to docks that conform to adopted shoreline master programs and other local ordinances.
(d) The permission is not a grant of exclusive use of public aquatic lands to the dock owner. It does not prohibit public use of any aquatic lands around or under the dock. Owners of docks located on state-owned tidelands or shorelands must provide a safe, convenient, and clearly available means of pedestrian access over, around, or under the dock at all tide levels. However, dock owners are not required to allow public use of their docks or access across private lands to state-owned aquatic lands.
(e) The permission is not transferable or assignable to anyone other than a subsequent owner of the abutting upland property and is continuously dependent on the nature of ownership and use of the properties involved.

(5) Revocation. The permission may be revoked or canceled if:
(a) The dock or abutting residential owner has not met the criteria listed in subsection (2) or (4) of this section; or
(b) The dock significantly interferes with navigation or with navigational access to and from other upland properties. This degree of interference shall be determined from the character of the shoreline and water body, the character of other in-water development in the vicinity, and the degree of navigational use by the public and adjacent property owners;
(c) The dock interferes with preferred water-dependent uses established by law; or
(d) The dock is a public health or safety hazard.

(6) Appeal of revocation. Upon receiving written notice of revocation or cancellation, the abutting residential owner shall have thirty days from the date of notice to file for an administrative hearing under the contested case proceedings of chapter 34.04 RCW. If the action to revoke the permission is upheld, the owner shall correct the cited conditions and shall be liable to the state for any compensation due to the state from the use of the aquatic lands from the date of notice until permission requirements are met or until such permission is no longer needed. If the abutting residential owner disclaims ownership of the dock, the department may take actions to have it removed.

(7) Current leases. Current lessees of docks meeting the criteria in this section will be notified of their option to cancel the lease.

They will be provided a reasonable time to respond. Lack of response will result in cancellation of the lease by the department.

(8) Property rights. No property rights in, or boundaries of, public aquatic lands are established by this section.

(9) Lines of navigability. The department will not initiate establishment of lines of navigability on any shorelands unless requested to do so by the shoreland owners or their representatives.

(10) Nothing in this section is intended to address statutes relating to sales of second class shorelands.

Discussion on recreational docks, private

A residential owner of waterfront uplands may install a private recreational dock on abutting state-owned tidelands, shorelands, or bedlands without charge. The dock may be used only for private recreational purposes, must meet the criteria listed in the RCW and WAC above, and must meet applicable local regulations. This permission to install a dock is not equivalent to a lease or easement, and is not a grant of exclusive use of state-owned aquatic lands to the dock owner.

The dock owner may apply for a lease of the state-owned aquatic lands in question, and may wish to do so to gain more exclusive use of these lands, or if it does not meet the criteria listed in the RCW and WAC above. Such an application would follow the standard use authorization process, and the recreational dock would be treated as a water-dependent use. For workload management purposes, granting leases for private recreational docks is a low priority. SEE ALSO: Use authorizations; Water-dependent uses.

Permission for a dock will be revoked by the department if it interferes with navigation, interferes with a water-dependent use, or is a public health or safety hazard. A revocation can be appealed.

A houseboat or other residential use on state-owned aquatic lands does not qualify for a private recreational dock without

charge, because the resident is not the landowner. SEE ALSO: Residential uses.

Regulatory agencies and permits

WAC 332-30-122: Aquatic land use authorization.

All requirements in this section shall apply to the department. Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) General requirements.

(c) All necessary federal, state and local permits shall be acquired by those proposing to use aquatic lands. Copies of permits must be furnished to the department prior to authorizing the use of aquatic lands. When evidence of interest in aquatic land is necessary for application for a permit, an authorization instrument may be issued prior to permit approval but conditioned on receiving the permit.

(2) Application review. In addition to other management considerations, the following special analysis shall be given to specific proposed uses:

(a) Environment.

(i) Authorization instruments shall be written to insure that structures and activities on aquatic lands are properly designed, constructed, maintained and conducted in accordance with sound environmental practices.

(ii) Uses which cause adverse environmental impacts may be authorized on aquatic lands only upon compliance with applicable environmental laws and regulations and appropriate steps as may be directed are taken to mitigate substantial or irreversible damage to the environment.

(iii) Nonwater-dependent uses which have significant adverse environmental impacts shall not be authorized.

WAC 332-30-134: Aquatic land environmental protection.

(1) Planning. Coordinated, interagency planning will be encouraged to identify and protect natural resources of state-wide value.

(2) Reliance on other agencies. Aquatic land natural resources of state-wide value are protected by a number of special state and federal environmental protection programs including: State Shorelines Management Act, Environmental Policy Act, Hydraulics Project Approval, National Environmental Policy Act, Federal Clean Water Act, Fish and Wildlife Coordination Act and section 10 of the Rivers and Harbors Act. Governmental agencies with appropriate jurisdiction and expertise will normally be depended on to evaluate environmental impacts of individual projects and to incorporate appropriate protective measures in their respective project authorizations.

(3) Method. Leases and other proprietary aquatic land conveyances may include environmental protection requirements when:

(a) Regulatory agencies' approvals are not required;

(b) unique circumstances require long-term monitoring or project performance; or

(c) substantial evidence is present to warrant special protection.

Discussion on regulatory agencies and permits

For most developments or activities on or near the water, on both state-owned aquatic lands and private lands, the project proponent must obtain a variety of local, state, and federal regulatory permits and approvals. Applicants for use authorizations should be made aware that all appropriate permits must be acquired before a final use authorization will be issued. Staff should develop a close working relationship with regulatory staff in their Region to learn about these projects, better coordinate with other agencies on potential environmental impacts, and gain opportunities to be involved early in the development process.

Public notices relating to regulatory permits are often the way the department first learns of proposed developments on

state-owned aquatic lands. Staff needs to promptly contact the party proposing the project to inform them that they must apply for a lease from the state and that the proposed use will need to be consistent with the department's statutory management goals and responsibilities.

The department usually has an opportunity to significantly reduce potential impacts from a project, and to reduce contention over the project, by being involved in the regulatory process from the outset. This involves early review and comment on permits proposed by other agencies and on environmental impact statements developed for projects. SEE ALSO: State Environmental Policy Act; National Environmental Policy Act.

Through public notices, staff may discover projects that are not located on state-owned aquatic lands, but are adjacent to those lands and might impact them. The department should take advantage of opportunities to highlight concerns related to state-owned aquatic lands. Among the most important concerns are outfalls on non-state-owned aquatic lands that discharge onto state-owned aquatic lands.

REGULATORY AGENCIES AND PERMITS: PROPRIETARY VERSUS REGULATORY STANDARDS

Discussion on regulatory agencies and permits: proprietary versus regulatory standards

While regulatory permits and approvals are very important for protecting the environment and addressing other concerns, they are not the same as satisfying the department's proprietary responsibilities. Regulatory requirements are the minimum standard for department leases. The department can and will exceed regulatory minimums when necessary to meet its proprietary obligations.

Regardless of regulatory actions, the department remains responsible for environmental protection for the long-term and in the broadest sense, in accordance with its statutes and regulations. Utilizing the knowledge and expertise of environmental regulatory agencies is a very useful and practical means of approaching many environmental concerns, but it does not replace the department's larger proprietary responsibility for "ensuring environmental protection," as described in RCW 79.90.455. Our proprietary responsibility is to manage state-owned aquatic lands in the best interests of all the citizens of the state, irrespective of regulatory rules. SEE ALSO: Public benefits; Environmental protection.

Staff should remind applicants who wish to use state-owned aquatic lands of the fundamental difference between regulatory and proprietary agencies. The regulator is the traditional government agent who can impose restrictions on a landowner in order to protect the rest of the community. This authority is strictly limited to protect the property rights of the landowner. Therefore, regulatory authority is relatively narrow and precise.

In contrast, the proprietary agency is, in effect, the landowner. The department does not impose requirements on how a person may use his or her own land, but instead determines whether that person may use "our" – the public's – land. The department's primary responsibility is to the public, not to the individual user. Our authority is restricted and guided by the legislature's direction in statute, and is broad and comprehensive enough for us to use our best judgement to determine what is in the best interests of the public.

The "reliance on other [regulatory] agencies," as described in WAC 332-30-134, is a means, not an end, to achieving environmental protection. Regulatory permitting processes are highly useful for identifying environmental problems, as well as conditions that should be placed on projects to address those problems. The information developed through

the permitting process and the expertise provided by regulatory staff may even suggest additional requirements beyond the regulatory authority that would be necessary for more comprehensive and effective environmental protection.

Whenever possible, staff should work with appropriate regulatory staff to see if the department and the regulator share the same concerns, and if these concerns can be addressed through the permitting process. For example, if both the regulatory agency and the department are concerned about public access, the length of a dock, or the location of habitat mitigation, the agencies can coordinate on resolving these issues through the permits. This also allows the lease and plan operations to be structured to accurately reflect the proposed development and its operations as it is permitted to be conducted.

WAC 332-30-134 lists circumstances when the department can establish environmental requirements in leases beyond those of regulatory agencies. To meet our proprietary responsibilities, these must be interpreted broadly. Because RCWs take precedence over WACs, this WAC cannot limit department actions if those actions are necessary to ensure environmental protection, as described in RCW 79.90.455.

Consider the following examples:

- Several salmon species in Puget Sound and Washington rivers have been declared threatened or endangered. The federal National Marine Fisheries Service and U.S. Fish & Wildlife Service are responsible for establishing requirements for protecting threatened and endangered species, but neither has yet issued regulations on salmon protection. The absence of regulations does not mean that the department is not responsible for protecting salmon and salmon habitat, nor does it mean that the department will wait for regulations before using its proprietary authority to require lessees to protect salmon. In terms of WAC 332-30-134, the "unique

circumstances" and "substantial evidence" in this case are the threatened or endangered status of salmon.

- The department strongly discourages residential uses on state-owned aquatic lands. When residential uses are allowed, however, they must use a sewage disposal system to prevent sewage discharge into the water. Many local governments authorize houseboats or live-aboards without sewage regulations, but the department will require either a sewer hook-up or documented sewage pump-out. The "unique circumstances" and "substantial evidence" in this case are the discharge of raw untreated sewage into waters over state-owned aquatic lands.

Establishing environmental protection requirements in a lease does not require a formal determination nor, for most projects, extensive studies. Instead, the department should prepare a clear and concise description of the environmental concerns and how the requirements are designed to address them. This description should be included in the lease or in previous communications with the applicant.

The department will not second-guess whether environmental regulations adequately satisfy their regulatory goals. Instead, the department always will ask whether environmental regulations adequately satisfy the department's proprietary goals. Also, the department will not issue highly detailed technical standards to "replace" regulatory standards. Instead, it will use a common-sense approach, building off regulatory standards when appropriate and always erring on the side of protecting the resource.

To repeat, regulatory requirements are the minimum standard for department leases. The department always will seek to cooperate with and benefit from the efforts of regulatory agencies, but is not limited to regulatory requirements. The department can and will exceed regulatory minimums when necessary to meet its proprietary obligations.

REGULATORY AGENCIES AND PERMITS: TYPES OF PERMITS

Discussion on regulatory agencies and permits: types of permits

The following table lists many activities which trigger the need for regulatory permits. These activities may be relevant for aquatic land managers if the activity occurs on or near state-owned aquatic lands. Some key permits are described following the table.

This information is from the Permit Handbook, produced by the Department of Ecology. Ecology is the best source of information on environmental regulatory permits in general.

Activity	Permit Name	Contact Agency
Using state-owned aquatic lands *for any purpose* (includes harbors, waterways, tidelands, shorelands, and beds of navigable waters)	Aquatic Land Use Authorization	Department of Natural Resources
Culturing food fish, shellfish and certain aquatic animals	Aquaculture Registration and Transfer Permit	Fish and Wildlife Hatcheries Program (360) 902-2661

Commercially harvesting and/or processing molluscan shellfish (clams, oysters, mussels)	Shellfish Operation License and Certificate of Approval	Dept. of Health, Office of Shellfish Programs (360)-236-3316

Activity	Permit Name	Contact Agency
Conducting projects authorized by the U.S. Army Corps of Engineers and/or applying for certain federal permits or funding	Coastal Zone Management Certification	Federal Permitting agency (Corps or other), or Dept. of Ecology, Coastal Zone Management staff (360) 407-6600
Work that uses, diverts, obstructs, or changes the natural flow or bed of state waters	Hydraulic Project Approval	Fish and Wildlife Habitat Program (360) 902-2534
Transporting noxious plants or plant parts	Noxious Aquatic and Emergent Weed Transport Permit	Agriculture, Plant Services Division (Yakima); (509) 576-3039

Excavation that alters or removes archaeological resources or Native Indian grave sites	Archaeological Excavation Permit	Community Development Office of Archaeology and Historic Preservation (360) 753-5010
Spilling or releasing a hazardous substance; also use when discovering a current release, a historical release, or a situation that could cause a release or clean up action	Hazardous Substance Release Notification Requirement (MTCA)	Nearest regional Ecology office
Activity	**Permit Name**	**Contact Agency**
Installing an underground storage tank and/or having an existing underground tank on site	Underground Storage Tank Notification Requirement	Ecology 1-800-826-7716 or regional office
Conducting a concentrated animal feeding operation that discharges to state/federal waters	1. Animal Feeding Operations permit 2. National Pollutant Discharge Elimination System (NPDES) permit 3. Statewide Discharge Permits	Ecology's Water Quality Program (360) 407-6600

Point source discharge of pollutants into surface waters (discharges from industrial facilities or sewage treatment plants; stormwater discharges from industrial sites and construction sites disturbing more than 5 acres)	National Pollutant Discharge Elimination System (NPDES) permit	Ecology regional office
Disposal of sanitary sewage though septic tanks and drainfields	On-site Sewage Disposal Permit	Local health department, Dept. of Health or Ecology

Activity	**Permit Name**	**Contact Agency**
Discharging industrial, commercial, or municipal waste to ground water; or, industrial or commercial waste to municipal sanitary sewer systems	Waste Discharge Permit	Ecology regional office or Dept. of Health
Using aquatic herbicides or pesticides to control noxious and non-noxious aquatic plants	Temporary Modification of Water Quality Criteria	Ecology regional office

Applying for a federal license or permit to conduct any activity that might result in a discharge of dredge or fill material into water or wetlands, or excavation in water or wetlands	Water Quality Certification (section 401 of the Clean Water Act)	Ecology Shorelands and Environmental Assistance Program (360) 407-6600
Constructing, modifying, or repairing any dam or controlling works for storage of 10 or more acre-feet of water, waste or mine tailings	Dam Safety Construction Permit	Ecology Headquarters Water Resources Program Dam Safety Section (360) 407-6600

Activity	**Permit Name**	**Contact Agency**
Constructing a barrier across a stream, channel, or water course if the barrier will create a reservoir	Reservoir Permit	Ecology Headquarter Water Resources Program (360) 407-6600

Developing or conducting an activity valued at $2,500 on or materially interfering with the normal public use of the water or shorelines of the state regardless of cost, and uses constituting a conditional use or variance under the local master program	Shoreline substantial development permit	Local city or county planning office
Locating a structure, excavating, or discharging dredged or fill material; transporting dredged material or ocean dumping	1. Section 404 of the Clean Water Act 2. Section 10 of the Rivers and Harbors Act	U.S. Army Corps of Engineers (206) 764-3495
Constructing a hydroelectric project	Federal Energy Regulatory Commission (FERC) License	FERC, Portland Regional Office, (503) 326-5840

Activity	**Permit Name**	**Contact Agency**

Working in wetlands	1. Water Quality Certification (Section 401 of the Clean Water Act) 2. Section 404 permit (Clean Water Act) 3. Section 10 permit (Rivers and Harbors Act) 4. Federal Water Pollution Control Act permit 5. Coastal Zone certificate 6. Shoreline Substantial development permit 7. Hydraulic Project Approval 8. State Water Pollution Control Act permit 9. Forest Practices permit	Appropriate federal, state or local agency. If unsure, contact Ecology Wetlands program

Joint Aquatic Resources Permit Application: The Joint Aquatic Resources Permit Application (JARPA) is a single combined permit application that can be used to apply for Hydraulic Project Approvals, Shoreline Management Permits, Approvals for Exceedance of Water Quality Standards, Water Quality Certifications, and U.S. Army Corps of Engineers permits issued under the Clean Water Act (Section 404 permits) and the Rivers and Harbors Act (Section 10 permits). Designed primarily for less complicated

projects, JARPA uses a checklist type format to help the applicant determine which aquatic permits are needed. A single application is then completed and copies sent to the agencies identified through completion of the checklist. JARPA may be initiated by an applicant, or agencies may recommend use of JARPA by an applicant.

JARPA does not cover department proprietary decisions, such as leases or other use authorizations. In JARPA, however, the department is identified as a potential landowner and the applicant is required to send the department a copy of the application. This will provide the department with basic knowledge of the project at the time of initial application for regulatory permits, allowing for early coordination with regulators on project design.

Hydraulic Project Approval permits: Any project that uses, diverts, obstructs or changes the natural flow or bed of any freshwater or saltwater of the state requires approval from the Washington Department of Fish and Wildlife (WDFW), in the form of a Hydraulic Project Approval (HPA). The focus of the permit process is to protect habitat and migration corridors critical to aquatic life. HPAs do not require a public notice and comment period, but the HPA process is an opportunity to identify and avoid impacts through early involvement in project design. Region staff should regularly communicate with WDFW staff responsible for HPAs in their region. If Region staff decides the HPA does not adequately protect state-owned aquatic lands or is missing information, they should consult with the Region Manager and coordinate a response to the Department of Fish and Wildlife.

National Pollution Discharge Elimination System Permits and State Waste Discharge Permits: The discharge of pollutants into the state's surface waters is regulated through National Pollution Discharge Elimination System (NPDES) permits. These permits place limits on the quantity and concentration of pollutants that may be discharged. To ensure compliance with these limits, permits require wastewater treatment or

impose other operational conditions. A single permit can cover a group of dischargers that have similar discharges, pollution control technology, and regulatory requirements. Examples of such operations include shipyards and fish hatcheries. The permits are generally for a period of five years and are required for:

- Wastewater discharges to surface water from industrial facilities or municipal sewage treatment plants.
- Stormwater discharges from industrial facilities and from construction sites of five or more acres.
- Stormwater discharges from separate municipal storm and sewer systems that serve populations of 100,000 or more.

State Waste Discharge (SWD) permits differ from NPDES permits in that they regulate the discharge or disposal of:

- Industrial, commercial, or municipal waste material into the state's ground waters.
- Industrial or commercial waste into municipal sanitary sewer systems.
- Use of water reclaimed from sewage treatment plants.

Additional permit information: To find more information about permits issued, proposed projects, changes to comprehensive plans, and related issues, staff should check the following resources:

- SEPA and NEPA registers, SEE ALSO: State Environmental Policy Act; National Environmental Policy Act.
- Department of Ecology mailing lists (Contact regional water quality programs)
- Army Corps of Engineers list of permits (Get on mailing list)
- JARPA lists (Get on mailing list)

- Local government planning office (Get on mailing list; may include both county and city)

- Newspapers for the local area

In addition to the above resources, staff should develop personal contact with local permit coordinators in:

- Department of Ecology regional offices
- Department of Fish and Wildlife regional offices
- Army Corps of Engineers regional offices
- Local government planning departments
- Coast Guard local offices
- Tribal natural resource agencies
- Local citizen organizations

Renewable resources

RCW 79.90.455: Aquatic lands--Management guidelines.

The management of state-owned aquatic lands shall be in conformance with constitutional and statutory requirements. The manager of state-owned aquatic lands shall strive to provide a balance of public benefits for all citizens of the state. The public benefits provided by aquatic lands are varied and include:
(1) Encouraging direct public use and access;
(2) Fostering water-dependent uses;
(3) Ensuring environmental protection;
(4) Utilizing renewable resources. Generating revenue in a manner consistent with subsections (1) through (4) of this section is a public benefit.

WAC 332-30-106 Definitions.

(59) "Renewable resource" means a natural resource which through natural ecological processes is capable of renewing itself.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(7) Renewable resource utilization is a high priority use of aquatic lands.

(10) Nonrenewable resource utilization may be allowed when not in conflict with renewable resource production and utilization, public use, or chapter 90.58 RCW.

Discussion on renewable resources

The most common and economically valuable renewable resources from aquatic lands are geoducks and other shellfish. Sand and gravel can be a renewable resource as long as the hydrogeomorphological systems (such as sand transported by rivers or wave action) are undisturbed. Also, public opportunities to use and enjoy the natural resources of state-owned aquatic lands – from shellfish harvesting to swimming in the ocean to walking on the beach – should be treated as renewable resources that can only be provided through natural ecological processes. SEE ALSO: Geoducks; Shellfish; Sand and gravel; Public use and access.

Any use of renewable resources must protect both that resource and all the other public benefits of state-owned aquatic lands. For example, renewable resources must not be harvested in such a way as to reduce the ability of the resource to renew.

Rent

Discussion on rent

For most uses of state-owned aquatic lands, the lessee must pay rent to the state. Depending on the use, this rate may be set by the water-dependent rent formula or at fair market value. For some public uses, use of state-owned lands is given free of charge. For more information on rent for a specific use, see the discussion of that use.

RENT: APPEALS AND ADMINISTRATIVE REVIEW

RCW 79.90.520: Aquatic lands--Administrative review of proposed rent.

The manager shall, by rule, provide for an administrative review of any aquatic land rent proposed to be charged. The rules shall require that the lessee or applicant for release file a request for review within thirty days after the manager has notified the lessee or applicant of the rent due. For leases issued by the department, the final authority for the review rests with the board of natural resources. For leases managed under RCW 79.90.475, the final authority for the review rests with the appropriate port commission. If the request for review is made within thirty days after the manager's final determination as to the rental, the lessee may pay rent at the preceding year's rate pending completion of the review, and shall pay any additional rent or be entitled to a refund, with interest thirty days after announcement of the decision. The interest rate shall be fixed, from time to time, by rule adopted by the board of natural resources and shall not be less than six percent per annum. Nothing in this section abrogates the right of an aggrieved party to pursue legal remedies. For purposes of this section, "manager" is the department except where state-owned aquatic lands are managed by a port district, in which case "manager" is the port district.

WAC 332-30-128: Rent review.

This section shall not apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).
(1) Eligibility to request review. Any lessee or applicant to lease or release state-owned aquatic lands may request review of any rent proposed to be charged by the department.
(2) Dispute officers. The manager of the marine lands division will be the rental dispute officer (RDO). The supervisor of the department, or his designee, will be the rental dispute appeals officer (RDAO).
(3) Submittals. A request for review of the rent (an original and two copies) shall be submitted within thirty days of notification by the department of the rent due from the lessee/applicant. The request for review shall contain sufficient information for the officers to make a decision on the appropriateness of the rent initially determined by the department. The burden of proof for showing that the rent is incorrect shall rest with the lessee/applicant.

(4) Rental due. The request for review shall be accompanied by one year's rent payment based on the preceding year's rate, or a portion thereof as determined by RCW 79.90.530; or based on the rate proposed by the department, or a portion thereof as determined by RCW 79.90.530, whichever is less. The applicant shall pay any additional rent or be entitled to a refund, with interest, within thirty days after completion of the review process provided in this section.

(5) Contents of request. The request for review shall state what the lessee/applicant believes the rent should be and shall contain, at the minimum, all necessary documentation to justify the lessee/applicant's position. This information shall include but not be limited to:

(a) Rationale. Why the rent established by the department is inappropriate. The supporting documentation for nonwater-dependent leases may include appraisals by professionally accredited appraisers.

(b) Lease information. A description of state-owned aquatic land under lease which shall include, but not be limited to:

(i) Lease or application number;

(ii) Map showing location of lease or proposed lease;

(iii) Legal description of lease area including area of lease;

(iv) The permitted or intended use on the leasehold; and

(v) The actual or current use on the leasehold premises.

(c) Substitute upland parcel. A lessee / applicant whose lease rent is determined according to RCW 79.90.480 (water-dependent leases) and who disputes the choice of the upland parcel as provided by WAC 332-30-123, shall indicate the upland parcel that should be substituted in the rental determination and shall provide the following information on the parcel:

(i) The county parcel number;

(ii) Its assessed value;

(iii) Its area in square feet or acres;

(iv) A map showing the location of the parcel; and

(v) A statement indicating the land use on the parcel and justifying why the parcel should be substituted.

(6) RDO review.

(a) The RDO shall evaluate the request for review within fifteen days of filing to determine if any further support materials are needed from the lessee/applicant or the department.

(b) The lessee/applicant or the department shall provide any needed materials to the RDO within thirty days of receiving a request from the RDO.

(c) The RDO may, at any time during the review, order a conference between the lessee/applicant and department staff to try to settle the rent dispute.

(d) The RDO shall issue a decision within sixty days of filing of the request. Such decision shall contain findings of fact for the decision. If a decision cannot be issued within that time, the lessee/applicant's request will automatically be granted and the rent proposed by the lessee/applicant will be the rent for the lease until the next rent revaluation; provided that, the RDO may extend the review period for one sixty-day period.

(7) RDAO review.

(a) The RDAO may, within fifteen days of the final decision by the RDO, be petitioned to review that decision.

(b) If the RDAO declines to review the petition on the decision of the RDO, the RDO's decision shall be the final decision of the RDAO.

(c) If the RDAO consents to review the decision, the review may only consider the factual record before the RDO and the written findings and decision of the RDO. The RDAO shall issue a decision on the petition containing written findings within thirty days of the filing of the petition. This decision shall be the RDAO's final decision.

(8) Board review.

(a) The board of natural resources (board) may, within fifteen days of the final RDAO decision, be petitioned to review that decision.

(b) If the board declines to review the petition, the RDAO decision shall be the final decision of the board.

(c) If the board decides to review the petition, the department and the lessee / applicant shall present written statements on the final decision of the RDAO within fifteen days of the decision to review. The board may request oral statements from the lessee / applicant or the department if the board decides a decision cannot be made solely on the written statements.

(d) The board shall issue a decision on the petition within sixty days of the filing of the written statements by the lessee/applicant and the department.

Discussion on rent: appeals and administrative review

Applicants for water-dependent use can appeal the determination of their rent, as determined both by the water-dependent rent formula and by fair market value for nonwater-dependent uses. The most common type of appeal is regarding the selection of upland tax parcel for the water-dependent rent formula. SEE ALSO: Water-dependent uses.

Rent appeals are handled administratively through the Division, but will usually require the assistance of the appropriate Region staff. To facilitate rent review, staff should prepare and maintain adequate records describing how the rent for any given use was determined.

RENT: FAIR MARKET VALUE

SEE: Nonwater-dependent uses; Valuation.

RENT: FOR IMPROVEMENTS

SEE: Improvements.

RENT: FOR LOG STORAGE

SEE: Log storage.

RENT: FOR MULTIPLE USES OR MIXED WATER-DEPENDENT AND NONWATER-DEPENDENT USES

SEE: Water-dependent uses

RENT: FOR NONWATER-DEPENDENT USES

SEE: Nonwater-dependent uses.

RENT: FOR PUBLIC RECREATION

SEE: Public use and access.

RENT: FOR PUBLIC UTILITIES

SEE: Utility lines.

RENT: FOR WATER-DEPENDENT USE

SEE Water-dependent uses.

RENT: INTEREST RATES

SEE: Interest rates

RENT: PAYMENT SCHEDULE

RCW 79.90.530: Aquatic lands--Payment of rent.

If the annual rent charged for the use of a parcel of state-owned aquatic lands exceeds four thousand dollars, the lessee may pay on a prorated quarterly basis. If the annual rent exceeds twelve thousand dollars, the lessee may pay on a prorated monthly basis.

WAC 332-30-122: Aquatic land use authorization.

(3) Rents and fees.

(a) When proposed uses of aquatic lands requiring an authorization instrument (other than in harbor areas) have an identifiable and quantifiable but acceptable adverse impact on state-owned aquatic land, both within and without the authorized area, the value of that loss or impact shall be paid by the one so authorized in addition to normal rental to the department or port as is appropriate.

(b) Normal rentals shall be calculated based on the classification of the aquatic land use(s) occurring on the

property. Methods for each class of use are described in specific WAC sections.
(c) Advance payments for two or more years may be collected in those situations where annual payments are less than document preparation and administration costs.
(d) Rentals for leases will normally be billed annually, in advance. If requested by a lessee in good standing, billings will be made:

(i) Quarterly on a prorated basis when annual rental exceeds four thousand dollars; or

(ii) Monthly on a prorated basis when annual rental exceeds twelve thousand dollars.

(e) A one percent per month charge shall be made on any amounts which are past due, unless those amounts are appealed. Users of aquatic properties shall not be considered in good standing when they have amounts more than thirty days past due.

Reserves, aquatic

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(3) The department shall consider the natural values of state-owned aquatic lands as wildlife habitat, natural area preserve, representative ecosystem, or spawning area prior to issuing any initial lease or authorizing any change in use. The department may withhold from leasing lands which it finds to have significant natural values, or may provide within any lease for the protection of such values.

WAC 332-30-106 Definitions.

(14) "Educational reserves" means accessible areas of aquatic lands typical of selected habitat types which are suitable for educational projects.
(16) "Environmental reserves" means areas of environmental importance, sites established for the continuance of environmental baseline monitoring, and/or areas of historical, geological or biological interest requiring special protective management.

(61) "Scientific reserves" means sites set aside for scientific research projects and/or areas of unusually rich plant and animal communities suitable for continuing scientific observation.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(1) These aquatic lands, unless withdrawn by the commissioner of public lands, will be managed for the public benefit.

WAC 332-30-151: Reserves (RCW 79.68.060).

(1) Types of reserves: Educational, environmental, scientific - see definitions (WAC 332-30-106).
(2) Aquatic lands of special educational or scientific interest or aquatic lands of special environmental importance threatened by degradation shall be considered for reserve status. Leases for activities in conflict with reserve status shall not be issued.
(3) The department or other governmental entity or institution may nominate specific areas for consideration for reserve status.
(4) Such nominations will be reviewed and accepted or rejected by the commissioner of public lands based upon the following criteria:

(a) The site will accomplish the purpose as stated for each reserve type.

(b) The site will not conflict with other current or projected uses of the area. If it does, then a determination must be made by the commissioner of public lands as to which use best serves the public benefit.

(c) Management of the reserve can be effectively accomplished by either the department's management program or by assignment to another governmental agency or institution.

(5) The department's reserves management program consists of prevention of conflicting land use activities in or near the reserve through lease actions. In those cases where physical protection of the area may be necessary the management of the area may be assigned to another agency.
(6) When DNR retains the management of reserve areas the extent of the management will consist of a critical review of lease applications in the reserve area to insure proposed activities or structures will not conflict with the basis for reserve designation. This review will consist of at least the following:

(a) An environmental assessment.
(b) Request of agencies or institutions previously identified as having a special interest in the area for their concerns with regard to the project.

(7) Proposed leases for structures or activities immediately adjacent to any reserve area will be subjected to the same critical review as for leases within the area if the structures and/or activities have the potential of:
(a) Degrading water quality,
(b) Altering local currents,
(c) Damaging marine life, or
(d) Increasing vessel traffic.

(8) All management costs are to be borne by the administering agency. Generally, no lease fee is required.

Discussion on reserves, aquatic

Before leasing state-owned aquatic lands, the department is required to consider the natural values of those lands as a natural area preserve, among other environmental purposes. The department can withhold from leasing lands which have significant natural values. The department will fulfill this responsibility by, among other things, establishing aquatic reserves. These reserves are to include "aquatic lands of special educational or scientific interest or aquatic lands of special environmental importance threatened by degradation..."

As the department prepares aquascapes and other management plans, it will identify those areas within each embayment that should be preserved for their natural values. Areas should be selected if they include such things as significant undisturbed habitat, connections between critical habitats for salmon and other species, or likely opportunities to restore these qualities.

Aquatic reserves then can be formally designated by the Commissioner. As much as possible, this process should occur before a use authorization application is made for a given parcel of state-owned aquatic lands. Once designated, no new development or lease conflicting with the reserve

status will be allowed within the aquatic reserve. As current leases expire, existing uses which conflict with the reserve status should be removed.

If an aquascape has not yet been prepared or an aquatic reserve has not yet been designated when a use authorization application is received, staff still must consider the value of the land as a natural area preserve before approving the application. If the land has high natural values, the department can withhold it from leasing pending possible designation as a formal aquatic reserve.

Residential uses

RCW 79.90.465: Definitions.

(3) "Nonwater-dependent use" means a use which can operate in a location other than on the waterfront. Examples include, but are not limited to, hotels, condominiums, apartments, restaurants, retail stores, and warehouses not part of a marine terminal or transfer facility.

WAC 332-30-115: Harbor area use classes.

(4) Residential use. Residential uses include apartments, condominiums, houseboats, single and multifamily housing, motels, boatels and hotels.

Discussion on residential uses

Residential uses include any occasion when a person or persons reside for a long period of time above state-owned aquatic lands. The definition of a residential use is based on the use, not on the kind of structure or vessel being used. The definition listed in WAC 332-30-115 is part of a rule on harbor areas, but it applies to other areas of state-owned aquatic lands as well.

With one exception, residential uses are nonwater-dependent uses. (The exception is houseboats, as described below.) As nonwater-dependent uses, the department strongly

discourages residential uses and will approve them only under very limited circumstances. Residential uses must meet the same strict standards as all other nonwater-dependent uses, meaning they will be allowed only in exceptional circumstances and only if they are compatible with water-dependent uses existing in or planned for the area. Also, nonwater-dependent uses, including most residential uses, must always yield in favor of water-dependent uses. SEE ALSO: Nonwater-dependent uses.

Existing leases for residential uses will not be renewed unless the use meets the current standards for nonwater-dependent uses. A new lease may not include any residential uses unless they, too, meet the standards for nonwater-dependent uses. This includes new leases for marinas or other facilities which existed and were in trespass before they came under a lease.

Like all nonwater-dependent uses, residential uses, if allowed at all, must pay rent based on the full market value for the use. This rent may be dramatically more expensive than nearby water-dependent uses, as the most comparable private land use often will be waterfront homes.

The department is concerned primarily with permanent or long-term residential uses. Short-term or transient residence on a vessel is allowed without specific department authorization. SEE ALSO: Transient moorage.

The determination of what is or is not permanent residential use, versus what is a short-term or transient habitation, must be made on a case-by-case basis. The following are indicators of a permanent, not transient, residential use:

- The place of inhabitation is anything other than a self-propelled vessel primarily and actually used for transportation.
- The inhabitants have no other primary residence.

- The place of inhabitation meets the local jurisdiction's definition of a residence for zoning or similar purposes.
- The inhabitants have registered the vessel or the marina as a legal residence for tax, voting, mail or similar purposes. This may be indicated by use of the marina as an address on mail or on business cards, or as a school bus stop.
- The inhabitants deduct the vessel as their primary residence for federal income tax purposes.
- The place has signs of continuous habitation, such as bicycles, gardens, or similar items not associated with boating; advertisements indicating use as a hotel or bed and breakfast or other business aboard the vessel; or “private property” or “no trespassing"” signs.
- The place of inhabitation is a motel, hotel or boatel.

If one or more of these indicators appear to be present in a location where residential uses are not provided for in a lease, or if the location appears to have more residential uses than provided for in a lease, staff should conduct a site visit or take other appropriate measures to determine compliance with department requirements and to determine whether further action should be taken. This includes meeting with a marina owner who has residential sub-tenants, if applicable. Whenever responding to concerns over residential uses in a marina or similar setting, staff should work directly with the department's lessee, not sub-tenants.

Residential uses have even greater restrictions in harbor areas. SEE ALSO: Harbor areas.

Residential uses on state-owned aquatic lands do not qualify for private recreational docks without charge, as they are not the property owners, but rather are tenants of the state-owned aquatic lands where they reside, even if they

own the structure or vessel. SEE ALSO: Recreational docks, private.

RESIDENTIAL USES: ANCHORAGES

WAC 332-30-139: Marinas and moorages.

(2) Anchorages suitable for both residential and transient use will be identified and established by the department in appropriate locations so as to provide additional moorage space.

Discussion on residential uses: anchorages

The department may establish anchorage suitable for residential and transient use in appropriate locations. Few locations on state-owned aquatic lands, however, are appropriate for nonwater-dependent uses such as residential anchorage, and the "exceptional circumstances" criteria must be met. Where locations have already been established for residential anchorages, the department will charge rent appropriate for nonwater-dependent uses. The department has no plans to establish new residential or transient anchorage locations.

RESIDENTIAL USES: HOUSEBOATS

RCW 79.90.465: Definitions.

(2) "Water-oriented use" means a use which historically has been dependent on a waterfront location, but with existing technology could be located away from the waterfront. Examples include, but are not limited to, wood products manufacturing, watercraft sales, fish processing, petroleum refining, sand and gravel processing, log storage, and house boats. For the purposes of determining rent under this chapter, water-oriented uses shall be classified as water-dependent uses if the activity either is conducted on state-owned aquatic lands leased on October 1, 1984, or was actually conducted on the state-owned aquatic lands for at least

three years before October 1, 1984. If, after October 1, 1984, the activity is changed to a use other than a water-dependent use, the activity shall be classified as a nonwater-dependent use. If continuation of the existing use requires leasing additional state-owned aquatic lands and is permitted under the shoreline management act of 1971, chapter 90.58 RCW, the department may allow reasonable expansion of the water-oriented use.

WAC 332-30-106 Definitions.

(27) "Houseboat" means a floating structure normally incapable of self propulsion and usually permanently moored that serves as a place of residence or business. Otherwise called a floating home.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(21) Houseboats are considered to be a low priority use of aquatic land.

Discussion on residential uses: houseboats

The term "houseboats" includes house barges. It does not include live-aboard vessels primarily designed for self-propelled transportation, even if they are used as a residence.

Unlike every other residential use, houseboats are water-oriented uses. As a water-oriented use, houseboats established before October 1, 1984, are treated as water-dependent, and houseboats established or moved after October 1, 1984, are treated as nonwater-dependent. A house boat that qualifies to be treated as water-dependent may move from one houseboat site to another houseboat site and continue to be treated as water-dependent as long as there is no net increase in sites and as long as no water-dependent uses are displaced or prevented from being established in the future due to the move. SEE ALSO: Water-oriented uses.

Houseboats are prohibited in harbor areas. SEE ALSO: Harbor areas.

RESIDENTIAL USES: IN MARINAS

Discussion on residential uses: residential uses in marinas

Within a marina or similar facility, the most appropriate time to eliminate residential uses is when a lease is up for re-lease or assignment. Before a re-lease or assignment may be granted, either the lessee must eliminate all residential uses which do not meet the standards for nonwater-dependent uses or, at a minimum, the lessee and the department must agree on a plan and timeline for eliminating all such residential uses within the marina or on the site. SEE ALSO: Marinas and moorage facilities.

This agreement, to be a binding clause in the lease, must include the identification of how many residential uses are currently present, a prohibition on new residential uses, a requirement that as existing residents vacate no new residents may replace them, and a deadline for when all residential uses will be eliminated from the marina or site under penalty of default on the lease. Appropriate portions of this agreement must be included in any subleases.

A marina operator must pay rent based on nonwater-dependent use for the entire area occupied by residential uses within the marina, including associated dock areas and a proportionate share of any common areas. To avoid this, a marina operator may wish to transfer residential uses to any privately-owned aquatic lands within the marina.

Some seasonal or limited residential uses may be accommodated, such as for off-season fishers or boat crews or for one or two slips in a marina for security reasons.

These still must meet the standards for nonwater-dependent uses, perhaps as accessory uses, and must be specifically covered by the terms of a lease.

RESIDENTIAL USES: LIVE-ABOARDS

Discussion on residential uses: live-aboards

Live-aboards are the most common residential use in marinas. A live-aboard residence on a vessel on state-owned aquatic lands is always a nonwater-dependent use. Converting an otherwise water-dependent activity (moorage of a vessel used in water-borne navigation) to a nonwater-dependent activity (residential use) does not qualify as water-dependent or even water-oriented. This means that even those people who lived aboard their vessels (except for houseboats) before October 1, 1984, will not be allowed to stay unless they meet the standards for nonwater-dependent uses.

RESIDENTIAL USES: SEWAGE AND WASTEWATER

WAC 332-30-139: Marinas and moorages.

(3) Upland sewage disposal approved by local government and appropriate state agencies is required for all vessels used as a residence at a marina or other location.

Discussion on residential uses: sewage and wastewater

If a residential use is allowed on state-owned aquatic lands, it must have upland sewage disposal. This may be through a sewer connection or documented use of a pump-out facility. In no circumstances may residential sewage be discharged into the water.

Also, the boat owner and the marina owner, if applicable, must prevent discharge of other pollutants, such as fuel, cleaners, paint, garbage and "gray water." Any sewer discharge or excessive discharge of other pollutants from residential uses will be grounds for revoking a lease, including revoking a marina lease if the marina owner fails to take adequate steps to control discharge by boat or houseboat owners.

Resource Management Cost Account

RCW 79.64.020: Resource management cost account--Use.
A resource management cost account in the state treasury is hereby created to be used solely for the purpose of defraying the costs and expenses necessarily incurred by the department in managing and administering public lands and the making and administering of leases, sales, contracts, licenses, permits, easements, and rights of way as authorized under the provisions of this title. Appropriations from the account to the department shall be expended for no other purposes. Funds in the account may be appropriated or transferred by the legislature for the benefit of all of the trusts from which the funds were derived.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.
(2) Resource management cost account revenue from leasing of these aquatic lands shall be used to reduce the general tax burden and for aquatic land management programs that are of benefit to the public.

Discussion on Resource Management Cost Account

The Resource Management Cost Account (RMCA) receives some of the revenue generated from the department's management of state-owned aquatic lands. The money in this account is used to pay for management costs.

The remainder goes to the Aquatic Lands Enhancement Account to fund public access and habitat enhancement projects. SEE ALSO: Aquatic Lands Enhancement Account.

Right-of-entry

SEE: Use authorizations.

Right-of-way

SEE: Use authorizations; Linear projects.

River management

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.
(23) Use and/or modification of any river system shall recognize basic hydraulic principles, as well as harmonize as much as possible with the existing aquatic ecosystems, and human needs.

WAC 332-30-163: River management.
(1) Use and/or modification of any river system shall recognize basic hydraulic principles, as well as harmonize as much as possible with the existing aquatic ecosystems, and human needs.
(2) Priority consideration will be given to the preservation of the streamway environment with special attention given to preservation of those areas considered esthetically or environmentally unique.
(3) Bank and island stabilization programs which rely mainly on natural vegetative systems as holding elements will be encouraged.
(4) Research will be encouraged to develop alternative methods of channel control, utilizing natural systems of stabilization.
(5) Natural plant and animal communities and other features which provide an ecological balance to a streamway, will be recognized

in evaluating competing human use and protected from significant human impact.

(6) Normal stream depositions of logs, uprooted tree snags and stumps which abut on shorelands and do not intrude on the navigational channel or reduce flow, or adversely redirect a river course, and are not harmful to life and property, will generally be left as they lie, in order to protect the resultant dependent aquatic systems.

(7) Development projects will not, in most cases, be permitted to fill indentations such as mudholes, eddies, pools and aeration drops.

(8) Braided and meandering channels will be protected from development.

(9) River channel relocations will be permitted only when an overriding public benefit can be shown. Filling, grading, lagooning or dredging which would result in substantial detriment to navigable waters by reason of erosion, sedimentation or impairment of fish and aquatic life will not be authorized.

(10) Sand and gravel removals will not be permitted below the wetted perimeter of navigable rivers except as authorized under a departments of fisheries and game hydraulics permit (RCW 75.20.100). Such removals may be authorized for maintenance and improvement of navigational channels.

(11) Sand and gravel removals above the wetted perimeter of a navigable river (which are not harmful to public health and safety) will be considered when any or all of the following situations exist:

(a) No alternative local upland source is available, and then the amount of such removals will be determined on a case by case basis after consideration of existing state and local regulations.

(b) The removal is designed to create or improve a feature such as a pond, wetland or other habitat valuable for fish and wildlife.

(c) The removal provides recreational benefits.

(d) The removal will aid in reducing a detrimental accumulation of aggregates in downstream lakes and reservoirs.

(e) The removal will aid in reducing damage to private or public land and property abutting a navigable river.

(12) Sand and gravel removals above the wetted perimeter of a navigable river will not be considered when:

(a) The location of such material is below a dam and has inadequate supplementary feeding of gravel or sand.

(b) Detached bars and islands are involved.

(c) Removal will cause unstable hydraulic conditions detrimental to fish, wildlife, public health and safety.

(d) Removal will impact esthetics of nearby recreational facilities.

(e) Removal will result in negative water quality according to department of ecology standards.

(13) Bank dumping and junk revetment will not be permitted on aquatic lands.

(14) Sand and gravel removal leases shall be conditioned to allow removal of only that amount which is naturally replenished on an annual basis.

Roads

SEE: Bridges and roads.

S

Sales

SALES: OF AQUATIC LANDS

Discussion on sales: of aquatic lands

Numerous statutes discuss the rules and procedures for selling state-owned tidelands or shorelands. However, all these statutes have been overruled by RCW 79.94.150, which prohibits sales of state-owned aquatic lands to anyone other than a public entity. Furthermore, such sales must be solely for public use. There are two exceptions: second class tidelands may be sold under certain conditions; and accreted tidelands and shorelands may be sold to the owner of adjacent tidelands or shorelands. For more information on these sales, SEE ALSO: State-owned aquatic lands.

SALES: OF GEODUCKS

SEE: Geoducks

SALES: OF SAND AND GRAVEL

SEE: Sand and gravel

SALES: OF SHELLFISH

SEE: Shellfish

SALES: OF VALUABLE MATERIALS

RCW 79.90.060: "Valuable materials."
Whenever used in chapters 79.90 through 79.96 RCW the term "valuable materials" when referring to aquatic lands means any product or material within or upon said lands, such as forest products, forage, stone, gravel, sand, peat, agricultural crops, and all other materials of value except mineral, coal, petroleum, and gas as provided for under chapters 79.01 and 79.14 RCW.

Discussion on sales: of valuable materials

The department historically has sold commodities and valuable materials from the beds, tidelands, and shorelands of state-owned aquatic lands. Several types of marketable commodities are located on state-owned aquatic lands. A decision to sell such commodities is based on the same principles that apply to other land management decisions, in that the sale must provide benefits to the public, must ensure environmental protection, and otherwise meet the department's overall statutory responsibilities. For more information on these sales, SEE ALSO: Sand and gravel.

Sand and gravel

Discussion on sand and gravel

Sand and gravel in streams, rivers, and bedlands have historically been gathered and used for a variety of purposes. However, removing sand and gravel may have serious environmental impacts. The department must ensure protection of the environment, and ensure that these impacts are eliminated or fully mitigated before allowing sand and gravel to be collected from state-owned aquatic lands. SEE ALSO: Environmental protection.

Sand and gravel removal can directly or indirectly harm critical habitat, most importantly habitat needed by fish. Rivers provide both rearing and spawning habitat for many

fish species, notably salmon and trout. Removal of sand and gravel from rivers can stress or kill fish populations through:

- Creating extreme turbidity and cloudiness.
- Redirecting stream flow and thereby stranding fish, especially juveniles, on excavated bars, within pits or in de-watered channels.
- Covering or disturbing incubating eggs in the gravel.
- Changing water temperature.

In addition, sand and gravel removal can cause:

- Loss of streamside vegetation.
- Removal of large woody debris (a component of fish habitat).
- Loss of stream habitat diversity (pools, riffles, side channels).
- Loss of bed stability, especially spawning riffles.

When lakes and river levels are low in the summer, sand and gravel has sometimes been gathered by scraping the tops of sandbars and exposed river beds. This practice is known as scalping. Even though the removal operation may not enter the water, scalping often has negative environmental impacts, as it can remove rearing and spawning habitat for many fish species. SEE ALSO: River management.

The department will not allow removal of sand and gravel unless it can be assured that all the impacts described above can be avoided or otherwise appropriately mitigated. In particular, with the recent listing of several salmon species as endangered or threatened, the department will not allow any such removal if there is a significant possibility of adverse impacts to salmon or salmon habitat. SEE ALSO: Endangered Species Act.

If the department does allow sand and gravel removal, the party conducting the removal also must acquire several regulatory permits. The reviews conducted through these permit processes may help the department assess the

impacts of the proposed sand and gravel removal on aquatic habitats and suggest conditions necessary to eliminate or mitigate those impacts. Environmental restrictions associated with these permits generally prohibit sand and gravel removal when there are high water flows or fish spawning. SEE ALSO: Regulatory agencies and permits.

When sand and gravel is contaminated and being disposed of at a site for contaminated sediments, or when it is gathered and disposed of in the water as part of a navigational dredging operation, that activity is covered by the programs or guidance on the use of sediments, dredging, and dredge disposal. SEE ALSO: Sediments.

SAND AND GRAVEL: SALES

RCW 79.90.060: "Valuable materials."

Whenever used in chapters 79.90 through 79.96 RCW the term "valuable materials" when referring to aquatic lands means any product or material within or upon said lands, such as forest products, forage, stone, gravel, sand, peat, agricultural crops, and all other materials of value except mineral, coal, petroleum, and gas as provided for under chapters 79.01 and 79.14 RCW.

RCW 79.90.300: Sale of rock, gravel, sand, silt, and other valuable materials.

The department of natural resources, upon application by any person or when determined by the department to be in the best interest of the state, may enter into a contract or lease providing for the removal and sale of rock, gravel, sand, and silt, or other valuable materials located within or upon beds of navigable waters, or upon any tidelands or shorelands belonging to the state and providing for payment to be made therefor by such royalty as the department may fix, by negotiation, by sealed bid, or at public auction. If application is made for the purchase of any valuable material situated within or upon aquatic lands the department shall inspect and appraise the value of the material in the application.

RCW 79.90.310: Sale of rock, gravel, sand and silt--Application--Terms of lease or contract--Bond--Payment--Reports.

Each application made pursuant to RCW 79.90.300 shall set forth the estimated quantity and kind of materials desired to be removed and shall be accompanied by a map or plat showing the area from which the applicant wishes to remove such materials. The department of natural resources may in its discretion include in any lease or contract entered into pursuant to RCW 79.90.300 through 79.90.320, such terms and conditions deemed necessary by the department to protect the interests of the state. In each such lease or contract the department shall provide for a right of forfeiture by the state, upon a failure to operate under the lease or contract or pay royalties or rent for periods therein stipulated, and the department shall require a bond with a surety company authorized to transact a surety business in this state, as surety to secure the performance of the terms and conditions of such contract or lease including the payment of royalties. The right of forfeiture shall be exercised by entry of a declaration of forfeiture in the records of the department. The amount of rock, gravel, sand or silt taken under the contract or lease shall be reported monthly by the purchaser to the department and payment therefor made on the basis of the royalty provided in the lease or contract.

RCW 79.90.320: Sale of rock, gravel, sand and silt--Investigation, audit of books of person removing.

The department of natural resources may inspect and audit books, contracts, and accounts of each person removing rock, gravel, sand, or silt pursuant to any such lease or contract under RCW 79.90.300 and 79.90.310 and make such other investigation and secure or receive any other evidence necessary to determine whether or not the state is being paid the full amount payable to it for the removal of such materials.

RCW 79.90.325: Contract for sale of rock, gravel, etc.--Royalties--Consideration of flood protection value.

Whenever, pursuant to RCW 79.01.134, the commissioner of public lands enters into a contract for the sale and removal of rock, gravel, sand, or silt out of a riverbed, the commissioner shall, when establishing a royalty, take into consideration flood

protection value to the public that will arise as a result of such removal.

WAC 332-30-126: Sand and gravel extraction fees.

This section shall not apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) Public auction or negotiation. The royalty for sand, gravel, stone or other aggregate removed from state-owned aquatic lands shall be determined through public auction or negotiation.

(2) Royalty rate. A negotiated royalty shall reflect the current fair market value of the material in place. The "income approach" appraisal technique will normally be used to determine fair market value. Factors considered include, but are not limited to:

(a) The wholesale value of similar material, based on a survey of aggregate producers in the region or market area;

(b) Site specific cost factors including, but not limited to:

(i) Homogeneity of material;

(ii) Access;

(iii) Regulatory permits;

(iv) Production costs.

(3) Adjustments to initial royalty rate.

(a) Inflation. Annual inflation adjustments to the initial royalty rate shall be based on changes in the Producer Price Index (PPI) for the commodities of sand, gravel, and stone, as published by the United States Department of Commerce, Bureau of Labor Statistics. Annual PPI adjustments to the initial royalty rate shall begin one year after the effective date of establishment of each contract's royalty rate pursuant to subsection (1) of this section.

(b) Flood control. Initial negotiated royalty rates may be adjusted downward, depending on the degree to which removal of the material will enhance flood control.

(i) Any adjustment shall be based on hydrologic benefit identified in an approved comprehensive flood control management plan adopted by a general purpose local government and any state or federal agency with jurisdiction.

(ii) The department, prior to approving any proposed royalty rate adjustment for flood control benefits, may review the flood control plan to determine whether the

material removal actually reduces the potential for flooding.

(4) Payments. Royalty payments may be paid monthly or quarterly based on the volume of material sold, transferred from control of the contract holder, or otherwise utilized for purposes of the contract.

(5) Stockpiling. Stockpiling of removed material may be permitted.

(a) Material will be stockpiled separately from other material owned or controlled by the contract holder.

(b) Bonding or other satisfactory security will be required to cover the value of stockpiled material.

(6) Appeals. The state's determination of royalty rates set under subsections (2) and (3) of this section, are appealable through WAC 332-30-128.

WAC 332-30-163: River management.

(10) Sand and gravel removals will not be permitted below the wetted perimeter of navigable rivers except as authorized under a departments of fisheries and game hydraulics permit (RCW 75.20.100). Such removals may be authorized for maintenance and improvement of navigational channels.

(11) Sand and gravel removals above the wetted perimeter of a navigable river (which are not harmful to public health and safety) will be considered when any or all of the following situations exist:

(a) No alternative local upland source is available, and then the amount of such removals will be determined on a case by case basis after consideration of existing state and local regulations.

(b) The removal is designed to create or improve a feature such as a pond, wetland or other habitat valuable for fish and wildlife.

(c) The removal provides recreational benefits.

(d) The removal will aid in reducing a detrimental accumulation of aggregates in downstream lakes and reservoirs.

(e) The removal will aid in reducing damage to private or public land and property abutting a navigable river.

(12) Sand and gravel removals above the wetted perimeter of a navigable river will not be considered when:

(a) The location of such material is below a dam and has inadequate supplementary feeding of gravel or sand.

(b) Detached bars and islands are involved.

(c) Removal will cause unstable hydraulic conditions detrimental to fish, wildlife, public health and safety.

(d) Removal will impact esthetics of nearby recreational facilities.

(e) Removal will result in negative water quality according to department of ecology standards.

(13) Bank dumping and junk revetment will not be permitted on aquatic lands.

(14) Sand and gravel removal leases shall be conditioned to allow removal of only that amount which is naturally replenished on an annual basis.

Discussion on sand and gravel: sales

The department has the authority to sell sand and gravel from state-owned aquatic lands. A decision to sell these commodities is based on the same principles that apply to other land management decisions, in that the sale must provide benefits to the public, must ensure environmental protection, and otherwise meet the department's overall statutory responsibilities. Such removal must be done in an environmentally sensitive manner. SEE ALSO: Public benefits; Environmental protection.

Sales of sand and gravel from state-owned aquatic lands have decreased over the years for several reasons:

- Removal of sand and gravel has negative impacts on habitat.
- Sand and gravel removal is no longer used for flood control.
- The supply and quality of river gravel varies at a given bar site as water flow continually sorts and moves the material.
- Areas where gravel and sand could be removed are often remote and difficult to access, leading to higher transport and processing costs.

- Upland sources of gravel currently provide the majority of material because of the more dependable consistency and year round availability.

The department has adopted rules for establishing fees for the extraction of sand and gravel, in WAC 332-30-126. Prices for sand and gravel can be set through auction or sealed bid. Royalty sales may be made through auction, sealed bid or negotiation.

Royalties established though negotiation should reflect the current fair market value of the material. Normally, negotiations are based on surveys of the local wholesale (as opposed to retail) market, with the department seeking to obtain a price comparable to that which other pit owners receive for similar material. Generally, the Regions set a minimum price after completing research on fair market value. This minimum varies depending on the location and quality of the material, end user, and the nature of the project. SEE ALSO: Valuation.

If no local wholesale market comparisons are available, the department should use an income approach based on the retail market to determine fair market value. That is, the department should begin with the retail price, subtract the buyer's cost of mining and transporting the material or otherwise preparing it for use or sale, and subtract a reasonable profit or rate of return to determine fair market value equivalent to the wholesale price.

A number of factors may affect this cost. For example, clean sediment that became available as a result of the Mt. St. Helens eruption may sell for less because there is so much material available and there is a limited market for it.

The quality of the material may also affect the cost. For example, freshly dredged material that still contains living organisms may have greater value for habitat restoration projects, and clean white sand used for golf courses may bring higher prices than coarser material.

In calculating the rate charged to customers, the department should consider:

- Fair market value of the material, determined by surveying and averaging the rates charged by private suppliers in the area.
- Any responsibilities transferred to the purchaser under the contract, such as any financial liabilities.
- Complexity of permitting and mitigation required at the site.
- Complexity of the reclamation required by the department as landowner, as well as by the Surface Mine Reclamation Act.
- Amount of material to be removed.
- The use and value of the material to the end user.
- Amount of processing that is necessary to make a salable or usable product.
- Location of the deposit in relation to the end use or market.
- Quality of the material.
- Whether the removal of the material will enhance flood control.

Prices at or close to retail are usually charged for small or direct sales, where the operator is the end user, little or no processing is required after mining to obtain the desired end product, and little or no reclamation is required. Retail rates can be determined through surveying and averaging the rates charged for similar material by private suppliers in the area.

The department charges retail prices for the pit run less estimated operating costs on sales less than $1000. A profit factor for the purchaser is generally deducted from the proposed price. Generally, though, it is more common for people needing small amounts of material to go to private vendors.

Typically, for larger sales of sand, gravel, and rock, the purchaser accepts a large responsibility for maintaining the property and acts as the marketing agent for the sale of state-owned materials. In such an operation, the purchaser takes all of the financial risk and is responsible for creating and developing a market for the product. The department in turn takes a royalty, which is either a fixed rate per unit or a percentage of revenues.

If a purchaser of large amounts of sand and gravel wishes to use state-owned lands as sediment de-watering areas or storage areas, the department should also collect rent for use of these lands.

Salvage logs

SEE: Logs, salvage.

Sediments

Discussion on sediments

Aquatic lands consist of bedrock and the overlying sediments, which range from soft mud and particulates to sand and coarse gravel. These sediments are sometimes dredged or collected for many purposes. Unfortunately, pollutants released into aquatic environments tend to be absorbed by and accumulate in these sediments, especially in urban bays.

SEDIMENTS: CONTAMINATED SEDIMENTS

Discussion on sediments: contaminated sediments

Contamination of aquatic sediments can have far-reaching and long-lasting effects on state-owned aquatic lands. Contaminated sediments are those which have acute or chronic adverse effects on biological resources or pose a significant health risk to humans. Contaminated sediments commonly contain organic chemicals, heavy metals, and biologically active material.

Sediment contamination can affect:

- Water drinkability.
- The ability of aquatic plants and animals to take in nutrients and reproduce.
- The health of humans and animals living in proximity to contaminated areas.
- Future uses of aquatic lands.

Contaminated sediments cannot support the variety of aquatic life usually found in a particular habitat. Sediment changes also may weaken the natural balance, making native species vulnerable to more aggressive invasive exotic species, and changing the aquatic life in and on the sediment.

Development has caused certain heavy metals such as mercury, or organic chemicals such as creosote, to be mixed with sediments. An increase in organic material, such as wood debris, may act as a contaminant in the sediment as well. Contamination can cause chronic or acute effects on the biota normally found there. For example, at paper processing plants, wood chips off-loaded from barges may blow off the conveyor belt onto the tide flats. These chips become waterlogged and sink to the bottom. Because they

are organic, they decompose and deplete the sediments of oxygen needed by the worms and crustacea that live there. SEE ALSO: Log booming and storage.

Naturally occurring conditions also may cause problems. For instance, many areas of Puget Sound have naturally elevated levels of silver. If an organism is sensitive to silver, a population may be reduced in areas where silver levels are high. This is considered to be an elevated natural background level rather than a contamination. Either way, adding more silver to the sediments would cause a further reduction in reproduction, decrease biodiversity, and reduce the overall biological functions of the area.

Some typical causes of sediment contamination include:

- Waste water disposal
- Pulp and paper milling
- Aluminum smelting
- Oil refining
- Boat repair and construction
- Commercial moorage
- Agricultural runoff
- Urban runoff and pollution from non-point sources
- Illegal dumping
- Oil and chemical spills

The most important task in managing contaminated sediments is to try to avoid the contamination in the first place. To this end, virtually every use authorization on state-owned aquatic lands becomes a sediments issue. The department must take all possible steps in every use authorization to prevent contamination of sediments. SEE ALSO: Use authorizations; Environmental protection.

Contaminants flow into aquatic lands from point sources and non-point sources. A point source is an identifiable discharger such as a discrete pipe or structure that discharges treated or untreated waste water or storm water. Pipes, tunnels, and ditches are common examples of point

sources. The department must closely scrutinize point source discharges that occupy or discharge onto state-owned aquatic lands. SEE ALSO: Outfalls.

In contrast, a non-point source is a source of water pollution not associated with an identifiable discharger or discrete pipe or structure. Examples of non-point source pollution include failing septic tanks and agricultural runoff. The department has far less authority over non-point sources that originate away from state-owned aquatic lands, but can require operators on state-owned aquatic lands to properly address their own non-point contributions.

The most commonly suggested methods for addressing contaminated sediments are to:

- Cap the contaminated sediments.
- Dredge and move the contaminated sediments to a Confined Aquatic Disposal site.
- Chemically or biologically treat the contaminated sediments.
- Dredge and move the contaminated sediments to an upland disposal site.

A cap is a layer of clean sediments laid over the contaminated sediments, usually without moving the contaminated sediments. A cap typically does the least to remove the contaminants from the aquatic environment. Also, a cap can restrict any uses that would disturb the sediments, such as dredging or anchoring.

A Confined Aquatic Disposal (CAD) site may be located either near the shore or in deep water. Creating a CAD usually involves digging a depression, stabilizing the sides, filling the depression with contaminated sediments and contouring the top. One form of CAD is a nearshore confined fill, which means placing the sediments in a retaining structure near the shore and usually paving over it. This procedure in effect creates uplands and eliminates aquatic lands; if the aquatic lands were state-owned then the

land is still managed by the department. All CADs have a limited capacity, and provisions must be made to deal with contaminated sediments once a CAD is full. Like caps, CADs, especially in shallow waters, may restrict the possible uses of state-owned aquatic lands.

Chemical and biological treatment methods are designed to remove or neutralize the contamination from within the sediment. These methods are mostly experimental and still being studied.

Upland disposal involves transporting the sediments to either an ordinary landfill or a landfill designed for hazardous materials, if the sediments are highly toxic. Upland disposal typically does the most to remove the contaminants from the aquatic environment.

There is no simple rule on the best disposal option for contaminated sediments. Most other parties, especially potentially liable parties, are primarily interested in the lowest cost option. As land manager, however, the department's primary obligation is to seek the most long-term environmentally acceptable option. At a minimum, the department must be assured that the environmental effects of all reasonable alternatives, including upland disposal, have been thoroughly evaluated. For example, there should be an analysis of the likelihood and effects of the contamination escaping the disposal area. If the material is placed in a CAD, this would mean evaluating whether the site is at risk of submarine landslides and earthquakes that would disrupt the confinement.

Any contaminated sediment disposal option must be designed and considered within a larger plan for the environmental protection and restoration of the entire bay or river system. The ultimate goal of the department's sediment management efforts is to restore the aquatic resources and habitat, not merely to resolve the financial liability of any given party.

The need for clean sediments to cap contaminated sediments is growing. As a result, a market is developing for sediments that were once considered worthless. Clean sediments can be used for many purposes, including capping of contaminated sediment deposits, filling of aquatic lands, upland construction fill material, and golf course sand traps. Sediments used for these purposes are charged fair market value. For more information on sale of materials, SEE ALSO: Sand and gravel.

SEDIMENTS: DISPOSAL MANAGEMENT PROGRAMS, SITES, AND FEES

RCW 79.90.550: Aquatic land disposal sites--Legislative findings.

The legislature finds that the department of natural resources provides, manages, and monitors aquatic land disposal sites on state-owned aquatic lands for materials dredged from rivers, harbors, and shipping lanes. These disposal sites are approved through a cooperative planning process by the departments of natural resources and ecology, the United States corps of engineers, and the United States environmental protection agency in cooperation with the *Puget Sound water quality authority. These disposal sites are essential to the commerce and well being of the citizens of the state of Washington. Management and environmental monitoring of these sites are necessary to protect environmental quality and to assure appropriate use of state-owned aquatic lands. The creation of an aquatic land dredged material disposal site account is a reasonable means to enable and facilitate proper management and environmental monitoring of these disposal sites.

RCW 79.90.150: Material removed for channel or harbor improvement or flood control--Use for public purpose.

When gravel, rock, sand, silt or other material from any aquatic lands is removed by any public agency or under public contract for channel or harbor improvement, or flood control, use of such material may be authorized by the department of natural

resources for a public purpose on land owned or leased by the state or any municipality, county, or public corporation: PROVIDED, That when no public land site is available for deposit of such material, its deposit on private land with the landowner's permission is authorized and may be designated by the department of natural resources to be for a public purpose. Prior to removal and use, the state agency, municipality, county, or public corporation contemplating or arranging such use shall first obtain written permission from the department of natural resources. No payment of royalty shall be required for such gravel, rock, sand, silt, or other material used for such public purpose, but a charge will be made if such material is subsequently sold or used for some other purpose: PROVIDED, That the department may authorize such public agency or private landowner to dispose of such material without charge when necessary to implement disposal of material. No charge shall be required for any use of the material obtained under the provisions of this chapter when used solely on an authorized site. No charge shall be required for any use of the material obtained under the provisions of this chapter if the material is used for public purposes by local governments. Public purposes include, but are not limited to, construction and maintenance of roads, dikes, and levies. Nothing in this section shall repeal or modify the provisions of RCW 75.20.100 or eliminate the necessity of obtaining a permit for such removal from other state or federal agencies as otherwise required by law.

RCW 79.90.555: Aquatic land dredged material disposal site account.

The aquatic land dredged material disposal site account is hereby established in the state treasury. The account shall consist of funds appropriated to the account; funds transferred or paid to the account pursuant to settlements; court or administrative agency orders or judgments; gifts and grants to the account; and all funds received by the department of natural resources from users of aquatic land dredged material disposal sites. After appropriation, moneys in the fund may be spent only for the management and environmental monitoring of aquatic land dredged material disposal sites. The account is subject to the allotment procedure provided under chapter 43.88 RCW.

RCW 79.90.560: Fees for use of aquatic land dredged material disposal sites authorized.

The department of natural resources shall, from time to time, estimate the costs of site management and environmental monitoring at aquatic land dredged material disposal sites and may, by rule, establish fees for use of such sites in amounts no greater than necessary to cover the estimated costs. All such revenues shall be placed in the aquatic land dredged material disposal site account under RCW 79.90.555.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.

(9) Open water disposal sites shall be provided on beds of navigable waters for certain materials that are approved for such disposal by regulatory agencies and have no beneficial value.

WAC 332-30-166: Open water disposal sites.

(1) Open water disposal sites are established primarily for the disposal of dredged material obtained from marine or fresh waters. These sites are generally not available for disposal of material derived from upland or dryland excavation except when such materials would enhance the aquatic habitat.
(2) Material may be disposed of on state-owned aquatic land only at approved open water disposal sites and only after authorization has been obtained from the department. Applications for use of any area other than an established site shall be rejected. However, the applicant may appeal to the interagency open water disposal site evaluation committee for establishment of a new site.
(3) Application for use of an established site must be for dredged material that meets the approval of federal and state agencies and for which there is no practical alternative upland disposal site or beneficial use such as beach enhancement.
(4) The department will only issue authorization for use of the site after:

(a) The environmental protection agency and department of ecology notify the department that, in accordance with Sections 404 and 401, respectively, of the Federal Clean Water Act, the dredged materials are suitable for in-water disposal and do not appear to create a threat to human health, welfare, or the environment; and

(b) All necessary federal, state, and local permits are acquired.

(5) Any use authorization granted by the department shall be subject to the terms and conditions of any required federal, state, or local permits.

(6) The department shall suspend or terminate any authorization to use a site upon the expiration of any required permit.

(7) All leases for use of a designated site must require notification to DNR in Olympia twenty-four hours prior to each use. DNR Olympia must be notified five working days prior to the first use to permit an on-site visit to confirm with dump operator the site location.

(8) Pipeline disposal of material to an established disposal site will require special consideration.

(9) Fees will be charged at rates sufficient to cover all departmental costs associated with management of the sites. Fees will be reviewed and adjusted annually or more often as needed. A penalty fee may be charged for unauthorized dumping or dumping beyond the lease site. Army Corps of Engineers navigation channel maintenance projects where there is no local sponsor are exempt from this fee schedule.

FEES

(a) Puget Sound and Strait of Juan De Fuca: All disposal sites $0.45 per cubic yard (c.y.), $2,000 minimum

(b) Grays Harbor/Willapa Bay: All disposal sites $0.10 per cubic yard (c.y.), minimum fee $300.00

(c) Damage fee - $5.00/cubic yard

(10) Open water disposal site selection. Sites are selected and managed by the department with the advice of the interagency open water disposal site evaluation committee (a technical committee of the aquatic resources advisory committee). The committee is composed of representatives of the state departments of ecology, fisheries, game, and natural resources as well as the Federal Army Corps of Engineers, National Marine Fisheries Service, Environmental Protection Agency, and Fish and Wildlife Service. The department chairs the committee. Meetings are irregular. The committee has developed a series of guidelines to be used in selecting disposal sites. The objectives of the site selection guidelines are to reduce damage to living resources known to utilize the area, and to minimize the disruption of normal

human activity that is known to occur in the area. The guidelines are as follows:

(a) Select areas of common or usual natural characteristics. Avoid areas with uncommon or unusual characteristics.

(b) Select areas, where possible, of minimal dispersal of material rather than maximum widespread dispersal.

(c) Sites subject to high velocity currents will be limited to sandy or coarse material whenever feasible.

(d) When possible, use disposal sites that have substrate similar to the material being dumped.

(e) Select areas close to dredge sources to insure use of the sites.

(f) Protect known fish nursery, fishery harvest areas, fish migration routes, and aquaculture installations.

(g) Areas proposed for dredged material disposal may require an investigation of the biological and physical systems which exist in the area.

(h) Current velocity, particle size, bottom slope and method of disposal must be considered.

(i) Projects transporting dredged material by pipeline will require individual review.

(ii) Placement of temporary site marking buoys may be required.

(k) The department will assure disposal occurs in accordance with permit conditions. Compliance measures may include, but are not limited to, visual or electronic surveillance, marking of sites with buoys, requiring submittal of operator reports and bottom sampling or inspection.

(l) Special consideration should be given to placing material at a site where it will enhance the habitat for living resources.

(m) Locate sites where surveillance is effective and can easily be found by tugboat operators.

(11) The department shall conduct such subtidal surveys as are necessary for siting and managing the disposal sites.

Discussion on sediments: disposal management programs, sites, and fees

Open-water disposal of dredged material is an environmentally-charged issue. Dredging and open-water disposal was virtually halted in Puget Sound in the early

1980s because of concerns about the environmental impacts from historic dredge disposal practices.

Several state and federal agencies have overlapping authority regarding management of dredged material, requiring significant interagency coordination. In Washington, this is done primarily through the Dredged Material Management Program (DMMP) and the Cooperative Sediment Management Program (CSMP). The DMMP consists of the Puget Sound Dredge Disposal Analysis (PSSDA), the Grays Harbor/Willapa Bay Dredge Disposal Analysis (GH/WBDDA), and the Columbia River Evaluation Framework (CREF). These programs pertain to different environmental conditions and concerns in various areas.

PSDDA governs open water disposal of materials from dredging of Puget Sound harbors and waterways. Four PSDDA agencies – the Department of Natural Resources, Department of Ecology, Army Corps of Engineers and the Environmental Protection Agency – operate cooperatively to develop standards, protocols and routines for joint and systematic sediment disposal decisions. The program oversees all dredged material testing and disposal activities in Puget Sound, and has a rigorous sediment testing protocol to evaluate whether material is suitable for open-water disposal sites.

This program provides a cost-effective and environmentally-sound process for managing clean or slightly-contaminated dredged material. Dredged disposal operations are limited to minimize impacts to aquatic resources, such as benthic organisms and out-migrating salmon.

Each major urban area or embayment has an associated dredged material disposal site. These are designated as either dispersive or non-dispersive. Currents are considered more likely to move the deposited material around at dispersive sites, while materials deposited at non-dispersive

sites are far more likely to remain on site. This distinction affects the types of material that can be deposited.

There are currently eight open-water disposal sites in Puget Sound:

Dispersive sites:
- Rosario Straits
- Port Townsend
- Port Angeles

Non-dispersive sites:
- Bellingham Bay
- Port Gardner
- Elliott Bay
- Commencement Bay
- Ketron Island

The PSDDA program also serves as the model for managing dredging and dredged material issues outside of Puget Sound. It resulted in both the Grays Harbor/Willapa Bay Dredge Disposal Analysis and the Columbia River Evaluation Framework. Although program specifics differ, the four PSDDA agencies direct dredging and disposal activities in these areas in a similar manner.

Dredging and dredged material disposal in the Columbia River system is managed largely by the Portland, Oregon District of the Army Corps of Engineers. Environmental concerns, such as sediment testing procedures, are managed according to a framework agreed to by the department and other Washington, Oregon, and federal agencies. The department is often involved in sales of dredged sand in this region because the sand in the Columbia River is relatively clean.

SEDIMENTS: DREDGING

WAC 332-30-106 Definitions.
(13) "Dredging" means enlarging or cleaning out a river channel, harbor, etc.

WAC 332-30-118: Tidelands, shorelands and beds of navigable waters.
(5) Shallow draft uses, such as barge terminals and marinas, shall be preferred over deep draft uses in areas requiring extensive maintenance dredging except the Columbia River.

Discussion on sediments: dredging

Dredging is used to maintain or increase the navigability of waterways, facilitate access to shore-based development, clean up contaminated sediments, or gather clean sediment for various purposes. Navigation is the most common reason for dredging. Silt, sand, and gravel moving into and accumulating in waterways can impair navigation by reducing required depths. The Army Corps of Engineers is responsible for dredging of federal waterways. Other public and private entities also are involved with operational, maintenance, and developmental dredging. SEE ALSO: Navigation.

The department should carefully scrutinize any project involving dredging activities for its potential impacts to aquatic habitat and vegetation, recreational activities, and other public benefits of aquatic resources. This scrutiny must consider both the area dredged and the area where the dredged material is to be deposited. Some dredging activities are viewed as routine. That is, once the original approval has been granted, routine dredging can continue without further authorization, for instance, to maintain navigation in existing channels. However, even this dredging must have opportunities for review if, for example, conditions change or new environmental protections are found necessary.

The Army Corps of Engineers is responsible for dredging navigational channels of state-owned aquatic lands to provide continued navigational opportunities in the waters of the state. The Corps jointly shares responsibility with EPA for regulating and disposing of the dredged material at approved open water disposal sites.

The department and the Department of Ecology have responsibility for assuring that dredging and disposal activities which take place in state waters comply with applicable state regulations (Ecology) and use authorizations (DNR). A memorandum of agreement between the Corps, EPA, the department, and Ecology guides the work of dredging and disposal in state waters.

SEDIMENTS: USE AUTHORIZATIONS

Discussion on sediments: use authorizations

The department should carefully scrutinize any project involving the movement of sediments for its potential impacts to aquatic habitat and vegetation, recreational activities, and other public benefits of aquatic resources. This scrutiny must consider both the area from which sediments are removed and the area where the material is to be deposited.

If sediments are moved in any way, they must be sampled and characterized under the appropriate program. The department may require the project proponent to sample sediments for contamination and initiate cleanup before entering into an authorization even if the project doesn't require removal or disposal of sediments.

There are two methods of testing: chemical and biological. Chemical testing is usually done first, as it is easier and less expensive than biological testing. In this procedure, sediments are tested for concentration of certain chemicals. If the concentrations are below the acceptable level, the material can be disposed in an unconfined site. If the

chemical concentration of the target chemicals is above the acceptable levels, biological response testing may be done. This procedure involves monitoring benthic organism mortality.

The state has paid millions of dollars for cleanup of contaminated sediments. It is always more expensive, in both monetary and non-monetary terms, to clean up contamination than it is to prevent it, so special care should be taken to ensure that proposed uses for aquatic lands are examined to identify possible risks of sediment contamination. This should include careful analysis of:

- Sensitive habitat in the area.
- Hazardous materials that may be used or distributed.
- Outfalls.
- Storage and disposal of solid and/or dangerous waste.
- Transportation required.
- Stormwater controls.
- Spill response plans.
- Relevant "best management practices."

The department receives use authorization applications for a variety of activities that have the potential to cause or increase sediment contamination and thereby damage the environment and trigger the state's liability. To reduce the risk of contamination, land managers should do as much of the following as is appropriate to each application:

- Require a review of existing environmental information and site records to determine the potential for past or on-going sediment contamination. This is known as a Phase 1 environmental assessment.

- Confirm that the sediment has been properly characterized and that any contamination has been identified, and require the applicant to conduct any needed sampling or testing.

- Address how any existing contamination must be handled by the applicant.

- Confirm with the Department of Ecology that all Clean Water Act section 401/404 checklist items have been met.

- Review the proposal for any potential point or non-point pollution sources, and identify the likely type and quantity of any contaminants.

- Direct the applicant to make all possible reductions in output of contaminants, and remind the applicant that contamination concerns are grounds for rejecting the application.

- If any likely contaminants remain, require an environmental monitoring program, and a cleanup and habitat restoration plan.

- Include standard language for indemnification from contamination in all agreements.

For use authorizations for sites with existing contamination, the applicant must, at a minimum, assure the department that the activities will cause no increase or spreading of contamination and will not inhibit future cleanup efforts. The application will be favored if the applicant also provides for a net cleanup of contamination.

In cases when the use has potential for new contamination, the applicant must – at minimum – minimize the potential contamination, have a satisfactory monitoring program, make regular reports on the results of the monitoring, guarantee cleanup and remediation of any contamination and restoration of the habitat, and contractually release the state from any liability for the contamination. The department must address contamination concerns before closing the lease to identify any contamination for which the lessee should be held responsible. Even with these precautions, the application

may be rejected if, for example, it causes significant harm to a functioning ecosystem or critical habitat, such as salmon feeding and spawning areas.
SEE ALSO: Use authorizations.

Shellfish

Discussion on shellfish

Shellfish are one of the most valuable renewable resources on state-owned aquatic lands, and harvesting shellfish is a popular recreational activitiy. Recreational harvesting requires a permit from the Washington Department of Fish and Wildlife and commercial harvesting also requires a use authorization. When authorizing uses of state-owned aquatic lands, the department must consider the effects on shellfish. In fact, shellfish are an excellent indicator of the health of the ecosystem in general. Outfalls especially can render shellfish unharvestable for health reasons. SEE ALSO: Renewable resources; Public use and access; Regulatory agencies and permits; Use authorizations; Environmental protection; Outfalls.

SHELLFISH: GEODUCKS

SEE: Geoducks

SHELLFISH: LEASING FOR COMMERCIAL SHELLFISH CULTIVATION

SEE: Aquaculture

SHELLFISH: THEFT

RCW 79.96.130: Wrongful taking of shellfish from public lands--Civil remedies.

(1) If a person wrongfully takes shellfish or causes shellfish to be wrongfully taken from the public lands and the wrongful taking is intentional and knowing, then the person shall be liable for damages of treble the fair market retail value of the amount of shellfish wrongfully taken. If a person wrongfully takes shellfish from the public lands under other circumstances, then the person shall be liable for damages of double the fair market value of the amount of shellfish wrongfully taken.

(2) For purposes of this section, a person "wrongfully takes" shellfish from public lands if the person takes shellfish:

(a) Above the limits of any applicable laws that govern the harvest of shellfish from public lands;

(b) without reporting the harvest to the department of fish and wildlife or the department of natural resources where such reporting is required by law or contract;

(c) outside the area or above the limits that an agreement or contract from the department of natural resources allows the harvest of shellfish from public lands; or

(d) without a lease or purchase of the shellfish where such lease or purchase is required by law prior to harvest of the shellfish.

(3) The remedies in this section are for civil damages and shall be proved by a preponderance of the evidence. The department of natural resources may file a civil action in Thurston county superior court or the county where the shellfish were taken against any person liable under this section. Damages recovered under this section shall be applied in the same way as received under geoduck harvesting agreements authorized by RCW 79.96.080.

(4) For purposes of the remedies created by this section, the amount of shellfish wrongfully taken by a person may be established either:

(a) By surveying the aquatic lands to reasonably establish the amount of shellfish taken from the immediate area where a person is shown to have been wrongfully taking shellfish;

(b) By weighing the shellfish on board any vessel or in possession of a person shown to be wrongfully taking shellfish; or

(c) By any other evidence that reasonably establishes the amount of shellfish wrongfully taken. The amount of shellfish established by (a) or (b) of this subsection shall be presumed to be the amount wrongfully taken unless the defendant shows by a preponderance of evidence that the shellfish were lawfully taken or that the defendant did not take the shellfish presumed to have been wrongfully taken. Whenever there is reason to believe that shellfish in the possession of any person were wrongfully taken, the department of natural resources or the department of fish and wildlife may require the person to proceed to a designated off-load point and to weigh all shellfish in possession of the person or on board the person's vessel.

(5) This civil remedy is supplemental to the state's power to prosecute any person for theft of shellfish, for other crimes where shellfish are involved, or for violation of regulations of the department of fish and wildlife.

Discussion on shellfish: theft

On lands that are not open for public harvesting, if a person knowingly or “wrongfully” takes shellfish from state-owned aquatic lands without a permit or lease, the person is liable for damages triple the fair market retail value of the amount of shellfish taken. If the person was unaware that they needed a permit or lease, then the person is liable for damages double the fair market value of the amount of shellfish taken. If theft of shellfish occurs on aquatic lands managed by the department, land managers should work with regional enforcement staff, who in turn will work with the appropriate enforcement agency (tribes, county or WDFW). SEE ALSO: Unauthorized uses.

Shorelands

RCW 79.90.040: "First class shorelands."

Whenever used in chapters 79.90 through 79.96 RCW the term "first class shorelands" means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between

the line of ordinary high water and the line of navigability, or inner harbor line where established and within or in front of the corporate limits of any city or within two miles thereof upon either side.

RCW 79.90.045: "Second class shorelands."

Whenever used in chapters 79.90 through 79.96 RCW the term "second class shorelands" means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, and more than two miles from the corporate limits of any city.

WAC 332-30-106 Definitions.

(33) "Line of navigability" means a measured line at that depth sufficient for ordinary navigation as determined by the board of natural resources for the body of water in question.

(46) "Ordinary high water" means, for the purpose of asserting state ownership, the line of permanent upland vegetation along the shores of nontidal navigable waters. In the absence of vegetation, it is the line of mean high water.

Discussion on shorelands

Shorelands are part of state-owned aquatic lands, and are generally those areas along the shores of rivers and lakes. In most cases, they are treated identically to tidelands. SEE ALSO: State-owned aquatic lands; Tidelands.

Shorelands and tidelands are classified as either first or second class. The class designation indicates the location of the site relative to the boundaries of incorporated city limits. First-class shorelands and tidelands are within two miles of incorporated city limits. Second-class shorelands and tidelands are more than two miles from the boundary of incorporated city limits. As city limits change, the classification of a given area of land may change. Besides location, the most important difference between first and second class shorelands and tidelands is that upland owners abutting first class shorelands and tidelands have a preference right to lease those lands. For more information on leasing preferences, SEE ALSO: Use authorizations.

The line of navigability is the boundary that separates bedlands from shorelands on navigable lakes and rivers. This is not based on a low water point, as with tidelands. Instead, it is based on where watercraft typical for that waterbody can be, and historically have been, safely operated. Although this line can be designated by the department, it can be finally determined only by a court. SEE ALSO: Navigation.

For many years, shorelands were routinely sold by the state. Today, approximately 74 percent of the state's shorelands remain in public ownership. In 1971, the Legislature prohibited the sale of first class shorelands except to other public entities, and then only if the land will be used solely for municipal or state purposes. In 1982, the legislature authorized the sale of second-class shorelands on lakes to private owners of abutting uplands if the sale is not in the public interest, as determined by the Board of Natural Resources. However, the department rarely sells second class shorelands. For more information on sales of aquatic lands, SEE ALSO: State-owned aquatic lands.

Shoreline Management Act

Discussion on Shoreline Management Act

The state Shoreline Management Act (SMA) requires local governments to designate and permit land uses along the state's shorelines. These local plans are called Shoreline Master Programs (SMPs). Water bodies covered by the act include:

- Lakes, including reservoirs, of 20 acres or more.
- Streams and rivers with a mean annual flow of 20 cubic feet per second or greater.
- Marine waters, including tidal and estuarine waters.

The act covers the water areas as well as a shoreline area landward of each of the above listed waters for 200 feet

measured on a horizontal plane from the ordinary high water mark, and all associated marshes, bogs, swamps, and river deltas.

The guidelines for developing local shoreline management plans are in the process of being updated. Once adopted, all local Shoreline Master Programs will need to be revised within two to three years to incorporate changes from the new guidelines. The revision process is an important opportunity for the department to help maintain consistency with local planning and the requirements for managing state-owned aquatic lands.

With regard to Shoreline Master Programs, land managers should:

- Read and be familiar with all Shoreline Master Programs for their assigned area.
- Be aware of proposed amendments to Shoreline Master Programs. Work with local planning agencies to determine if such amendments will affect state-owned aquatic lands. Be alert to changes which impose greater restrictions on water-dependent uses (such as prohibiting aquaculture) or changes that allow less restrictive uses along the shoreline for nonwater-dependent uses (such as smaller residential setbacks).
- Notify the Region growth management coordinator and the Division of upcoming proposed amendments and opportunities to comment on them.
- Evaluate proposed uses of state-owned aquatic lands to determine whether they are consistent with the local Shoreline Master Plan, or whether a variance or conditional use authorization would be required.

SEE ALSO: Growth Management Act; Aquatic land use planning.

State Environmental Policy Act

Discussion on State Environmental Policy Act

The State Environmental Policy Act (SEPA) is intended to ensure that environmental values are considered by state and local government officials making decisions about plans and projects. The department is usually not the lead agency on a SEPA process, unless the project requires only a use authorization and does not require any regulatory permits, or unless the project is being undertaken by the department itself. Otherwise, an environmental regulatory agency is usually the lead. It is important for the department to comment to the lead agency on environmental concerns during the SEPA process to protect the department's legal rights to take action on these concerns later.

The first step in the SEPA process is a determination of whether the proposal involves an "action" on the part of an agency. An "action," as described in WAC 197-11-704, includes:

- New or continuing activities financed, assisted, conducted, regulated, licensed or approved by an agency.
- New or revised agency rules, plans, policies or procedures, and legislative proposals.

Project actions are generally a construction or management activity located in a defined geographic area. Examples of project actions include:

- Construction of a marina
- Construction of docks and piers
- Siting of aquaculture net pens
- Construction of a breakwater
- Cleanup of contaminated sediments

Non-project actions generally involve decisions on policies, plans and programs that contain standards controlling use or modification of the environment. Examples of non-project actions include:

- Zoning ordinances
- Growth Management Plans
- Shoreline guidelines
- Baywide plans
- Water or sediment quality standards

A few actions that affect aquatic lands have categorical exemptions; that is, the entire category is exempt from SEPA review. These include minor repair or replacement of structures, but do not include new installation of structures. Examples of minor repair activities might include the repair of pilings, ramps, floats or mooring buoys. However, categorical exemptions do not apply if a project is in a designated environmentally sensitive area, or if a project consists of a series of actions, some of which are not exempt or which together may have a probable significant adverse environmental impact.

If an action triggers SEPA, then a lead agency is chosen to be responsible for complying with SEPA's procedural requirements. For private projects requiring permits or approvals from more than one agency, including a city, county or special district, the lead agency is usually the city, county or special district. For private projects requiring permits only from state agencies, the lead agency is one of the state agencies requiring a permit. Because the department does not issue permits for state-owned aquatic lands, but rather grants proprietary authorizations, the department will not usually be the lead agency.

The lead agency evaluates the types of impacts the project will have on the environment. This process may involve a variety of documents, including:

- Scoping Notices. A scoping notice discusses the broad outlines of the activity and its potential environmental impacts, and is prepared before a more complete Environmental Impact Statement. It can be extremely valuable to comment on a scoping notice because it is the earliest opportunity to raise concerns, and such concerns can guide the more thorough analysis performed later.

- Environmental Checklist. This checklist is a brief overview of potential environmental impacts, and is used to determine whether a full Environmental Impact Statement is needed.

- Determination of Non-Significance (DNS). If it is determined that the activity will not have significant adverse environmental impacts, a DNS will be issued. The department can comment and disagree with the determination. However, if the department disagrees, the department must become the lead agency on an environmental impact statement, which can be a major project. The department needs to determine the significance of the environmental concerns relative to the resources needed for that project. The department may often instead seek to address any remaining environmental issues through the use authorization required for activities on state-owned aquatic lands.

- Environmental Impact Statement (EIS). If it is determined that the project will have a "probable significant adverse environmental impact," an EIS will be required. This is a document that looks at potential environmental problems that would be caused by the activity, ways the activity could be changed to avoid or minimize problems, alternatives to the activity, and options for mitigating probable adverse environmental impacts. This process generally includes a draft EIS (DEIS), an opportunity for comments, and a final EIS (FEIS).

STATE ENVIRONMENTAL POLICY ACT: THE DEPARTMENT'S PROCESS

Discussion on State Environmental Policy Act: the department's process

The department is currently reviewing how it takes part in the SEPA process, and what should be the roles of various parts of the department. In particular, the role of the newly formed Environmental Quality and Compliance Division must be determined.

In the meantime, Regions, in consultation with the Division, should take the lead in responding on behalf of the department to project actions within each Region, and the Division should take the lead on non-project actions. Division staff may coordinate responses that involve more than one Region. The department SEPA Center may coordinate responses that involve more than one division. On many occasions, however, especially for major projects, the division of responsibility will not be cleanly defined. Division and Region staff must coordinate on a case-by-case basis to insure that proper responses are given to actions with potentially significant impacts to state-owned aquatic lands.

With regard to SEPA, staff should:

- Be routinely involved with local governments to find out about potential projects being planned by local governments or being permitted by local governments.

- Be routinely involved with other state agencies who are involved with approving projects (such as Ecology or Fish & Wildlife) or proposing projects (such as Transportation). This will allow early knowledge about potential projects affecting state-owned aquatic lands.

- Read the SEPA register to look for proposed projects affecting state-owned aquatic lands. The register is

updated each business day by the Department of Ecology. The Internet address is http://www3.dis.wa.gov/SEPA. Also, the Division has been compiling and distributing notices of interest. Regardless of such efforts, it is the land manager's responsibility to identify and be aware of proposals affecting their assigned areas.

Bring the project to the attention of the land manager's supervisor, the department's SEPA Center, the Region SEPA coordinator, and Division SEPA coordinator. Major projects may require a coordinated review, and if so, these projects must be raised to Executive Management either for information or for direct policy involvement.

Review the various documents produced through the SEPA process. In particular, pay close attention to scoping notices and draft environmental impact statements so the department's comments can be thoroughly addressed in final EISs.

If public hearings are held on a project or non-project action which will significantly affect state-owned aquatic lands, the department should be present at the hearings and prepared to offer comments and concerns. When a project has the potential to have major impacts on state-owned aquatic lands, work with the Region or Division Manager and SEPA coordinators on the comments to be submitted. Such comments should be coordinated between the Region and the Division. Comments should be thorough, diplomatic and submitted in a timely fashion. Copies of comments should be forwarded to the department SEPA Center, Region SEPA coordinator, and Division SEPA coordinator. SEE ALSO: National Environmental Policy Act.

State-owned aquatic lands

Washington State Constitution, Article XVII, Tide Lands

 # Section 1. Declaration of State Ownership.
The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: PROVIDED, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the court of the state.

 # Section 2. Disclaimer of Certain Lands.
The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: PROVIDED, the same is not impeached for fraud.

Washington State Constitution, Article XXVII, Schedule

 # Section 2. Laws in Force Continued.
All laws now in force in the Territory of Washington, which are not repugnant to the Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: PROVIDED, that this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company or any municipal or private corporation.

RCW 79.90.450: Aquatic lands--Findings.

The legislature finds that state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage. The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the department of natural resources the responsibility to manage these lands for the benefit of the public. The legislature finds that water-dependent industries and activities have played a major role in the history of the state and will continue to be important in the future. The legislature finds that revenues derived from leases of state-owned aquatic lands should be used to enhance opportunities for public recreation, shoreline access, environmental protection, and other public benefits associated with the aquatic lands of the state. The legislature further finds that aquatic lands are faced with

conflicting use demands. The purpose of RCW 79.90.450 through 79.90.545 is to articulate a management philosophy to guide the exercise of the state's ownership interest and the exercise of the department's management authority, and to establish standards for determining equitable and predictable lease rates for users of state-owned aquatic lands.

RCW 79.90.465: Definitions.

(12) "State-owned aquatic lands" means those aquatic lands and waterways administered by the department of natural resources or managed under RCW 79.90.475 by a port district. "State-owned aquatic lands" does not include aquatic lands owned in fee by, or withdrawn for the use of, state agencies other than the department of natural resources.

Discussion on state-owned aquatic lands

State-owned aquatic lands are included in the term "public lands," but not in the term "state lands," as those lands are used in statute. State-owned aquatic lands include tidelands, shorelands, bedlands, harbor areas, and waterways. SEE ALSO: Public lands; State lands; Tidelands; Shorelands; Bedlands; Harbor areas; Waterways.

STATE-OWNED AQUATIC LANDS: LEASING

SEE: Use authorizations

STATE-OWNED AQUATIC LANDS: MANAGEMENT GOALS

SEE: Public benefits

STATE-OWNED AQUATIC LANDS: SALES

RCW 79.94.150: First and second class tidelands and shorelands and waterways of state to be sold only to public entities-- Leasing--Limitation.

(1) This section shall apply to:

(a) First class tidelands as defined in RCW 79.90.030;

(b) Second class tidelands as defined in RCW 79.90.035;

(c) First class shorelands as defined in RCW 79.90.040;

(d) Second class shorelands as defined in RCW 79.90.045, except as included within RCW 79.94.210;

(e) Waterways as described in RCW 79.93.010.

(2) Notwithstanding any other provision of law, from and after August 9, 1971, all tidelands and shorelands enumerated in subsection (1) of this section owned by the state of Washington shall not be sold except to public entities as may be authorized by law and they shall not be given away.

(4) Nothing in this section shall:

(a) Be construed to cancel an existing sale contract;

(b) Prohibit sale or exchange of beds and shorelands where the water course has changed and the area now has the characteristics of uplands;

(c) Prevent exchange involving state-owned tide and shore lands.

RCW 79.94.160: Sale of state-owned tide or shore lands to municipal corporation or state agency--Authority to execute agreements, deeds, etc.

The department of natural resources may with the advice and approval of the board of natural resources sell state-owned tide or shore lands at the appraised market value to any municipal corporation or agency of the state of Washington when said land is to be used solely for municipal or state purposes: PROVIDED, That the department shall with the advice and approval of the attorney general, execute such agreements, writings, or relinquishments and certify to the governor such deeds as are necessary or proper to affect such sale or exchange.

Discussion on state-owned aquatic lands: sales

Numerous statutes – including RCW 79.90.090, RCW 79.90.100, RCW 79.90.110, RCW 79.94.080, RCW 79.94.090, RCW 79.94.270, and RCW 79.94.310 –

discuss the rules and procedures for selling state-owned tidelands or shorelands. However, all these statutes have been overruled by RCW 79.94.150, which prohibits such sale to anyone other than a public entity. Furthermore, RCW 79.94.160 requires that such sales be solely for public use. If such lands are to be sold to a public entity for public use, refer to the above listed RCWs for the rules and procedures. There are two exceptions: second class tidelands may be sold under certain conditions; and accreted tidelands and shorelands may be sold to the owner of adjacent tidelands or shorelands (see below).

STATE-OWNED AQUATIC LANDS: SALES OF ACCRETED TIDELANDS OR SHORELANDS

RCW 79.94.310: First and second class tide or shore lands-- Accretions--Lease.

Any accretions that may be added to any tract or tracts of tide or shore lands of the first or second class heretofore sold, or that may hereafter be sold, by the state, shall belong to the state and shall not be sold, or offered for sale, unless otherwise permitted by this chapter to be sold, and unless the accretions shall have been first surveyed under the direction of the department of natural resources: PROVIDED, That the owner of the adjacent tide or shore lands shall have the preference right to purchase said lands produced by accretion, when otherwise permitted by RCW 79.94.150 to be sold, for thirty days after said owner of the adjacent tide or shore lands shall have been notified by registered mail of his preference right to purchase such accreted lands.

Discussion on state-owned aquatic lands: sales of accreted tidelands or shorelands

An exception to the above rules is when accretions add to tidelands or shorelands which the state previously sold, as described above. This may happen if sediment washed onto the tidelands or shorelands making the extreme low tide line or line of navigability further from shore. In this case, the

new tidelands or shorelands belong to the state, but the owner of adjacent tidelands or shorelands has a preference right to purchase them. SEE ALSO: Tidelands; Shorelands. For more information on preference rights, SEE ALSO: State-owned aquatic lands.

STATE-OWNED AQUATIC LANDS: SALES OF SECOND-CLASS TIDELANDS

RCW 79.94.210: Second class shorelands on navigable lakes-- Sale.

(1) The legislature finds that maintaining public lands in public ownership is often in the public interest. However, when second class shorelands on navigable lakes have minimal public value, the sale of those shorelands to the abutting upland owner may not be contrary to the public interest: PROVIDED, That the purpose of this section is to remove the prohibition contained in RCW 79.94.150 regarding the sale of second class shorelands to abutting owners, whose uplands front on the shorelands. Nothing contained in this section shall be construed to otherwise affect the rights of interested parties relating to public or private ownership of shorelands within the state.

(2) Notwithstanding the provisions of RCW 79.94.150, the department of natural resources may sell second class shorelands on navigable lakes to abutting owners whose uplands front upon the shorelands in cases where the board of natural resources has determined that these sales would not be contrary to the public interest. These shorelands shall be sold at fair market value, but not less than five percent of the fair market value of the abutting upland, less improvements, to a maximum depth of one hundred and fifty feet landward from the line of ordinary high water.

(3) Review of the decision of the department regarding the sale price established for a shoreland to be sold pursuant to this

section may be obtained by the upland owner by filing a petition with the board of tax appeals created in accordance with chapter 82.03 RCW within thirty days after the mailing of notification by the department to the owner regarding the price. The board of tax appeals shall review such cases in an adjudicative proceeding as described in chapter 34.05 RCW, the administrative procedure act, and the board's review shall be de novo. Decisions of the board of tax appeals regarding fair market values determined pursuant to this section shall be final unless appealed to the superior court pursuant to RCW 34.05.510 through 34.05.598.

WAC 332-30-119: Sale of second class shorelands.

(1) Under RCW 79.01.474 state-owned second class shorelands on lakes legally determined or considered by the department of natural resources to be navigable, may be sold to private owners of abutting upland property where it is determined by the board of natural resources that the shorelands have minimal public value for uses such as providing access, recreation or other public benefit. The amount of shoreland subject to sale to any one individual shall be the amount fronting a lot within a recorded subdivision plat; or the greater of 100 feet or ten percent of the frontage owned by the applicant outside of a recorded subdivision. However, it shall be in the public interest to retain ownership of publicly-owned second class shorelands on navigable lakes where any of the following conditions exist:

(a) The shorelands are natural, conservancy, or equivalent designated areas under the local shoreline master program.

(b) The shorelands are located in front of land with public upland ownership or public access easements.

(c) Further sales of shorelands would preclude the establishment of public access to the lake, or adversely affect the public use and access to the lake.

(2) Prior to the sale of second class shorelands on a navigable lake, the department will:

(a) Depict on a suitable map the current ownership of all shorelands and identify those shorelands potentially available for sale as provided under WAC 332-30-119(1).

(b) Identify any privately owned shorelands, acquisition of which would benefit the public.

(c) Identify and establish the waterward boundary of the shorelands potentially available for sale or acquisition.

(d) Make an appraisal of the value of the shorelands potentially available for sale or acquisition in accordance with as many of the following techniques as are appropriate to the parcels in question:

(i) The market value of shorelands as of the last equivalent sale before the moratorium multiplied by the percentage increase in value of the abutting upland during the same period, i.e.,
FMV= (V2/V1) x (S1)
FMV= Current fair market value of shorelands
S1= Value of shorelands at time of last equivalent sale
V1= Value of abutting upland at time of last equivalent shoreland sale
V2= Current fair market value of upland to a maximum of 150 feet shoreward

(ii) Techniques identified in adopted aquatic land management WACs e.g. WAC 332-30-125

(iii) The sales price of the shoreland shall be the fair market value as determined in (2)(d)(i)(ii) but not less than five percent of the fair market value of the abutting uplands, less improvements, to a maximum depth of one hundred fifty feet landward from the line of ordinary high water.

(e) If necessary, prepare a lake management plan in cooperation with local government to guide future department activities on the publicly-owned aquatic lands.

(3) The board of natural resources shall determine whether or not the sale would be in the public interest, and a sales price shall be established by the department of natural resources in a reasonable period of time.

Discussion on state-owned aquatic lands: sales of second-class tidelands

The department, with the approval of the Board of Natural Resources, may sell second class shorelands, but rarely does so, as it is rarely in the public's interest to sell any aquatic lands. Any proposal to do so would need to meet the strict criteria and conditions listed above.

STATE-OWNED AQUATIC LANDS: USES

SEE: Water-dependent uses; Nonwater-dependent uses

STATE-OWNED AQUATIC LANDS: WITHHOLDING FROM LEASING

SEE: Reserves, aquatic

State-wide value

WAC 332-30-100: Introduction.

(1) Management goals. Management of state-owned aquatic lands will strive to:

(a) Foster water-dependent uses;

(b) Ensure environmental protection;

(c) Encourage direct public use and access;

(d) Promote production on a continuing basis of renewable resources;

(e) Allow suitable state aquatic lands to be used for mineral and material production; and

(f) Generate income from use of aquatic lands in a manner consistent with the above goals.

(2) Management methods. To achieve the above, state-owned aquatic lands will be managed particularly to promote uses and protect resources of state-wide value.

(a) Planning will be used to prevent conflicts and mitigate adverse effects of proposed activities involving resources and aquatic land uses of state-wide value. Mitigation shall be provided for as set forth in WAC 332-30-107(6).

(b) Areas having unique suitability for uses of state-wide value or containing resources of state-wide value may be managed for these special purposes. Harbor areas and scientific reserves are examples. Unique use requirements or priorities for these areas may supersede the need for mitigation.

(c) Special management programs may be developed for those resources and activities having state-wide value. Based on the needs of each case, programs may prescribe special management procedures or standards such as lease

auctions, resource inventory, shorter lease terms, use preferences, operating requirements, bonding, or environmental protection standards.

(d) Water-dependent uses shall be given a preferential lease rate in accordance with RCW 79.90.480. Fees for nonwater-dependent aquatic land uses will be based on fair market value.

(e) Research and development may be conducted to enhance production of renewable resources.

WAC 332-30-106 Definitions.

(66) "State-wide value." The term state-wide value applies to aquatic land uses and natural resources whose use, management, or intrinsic nature have state-wide implications. Such uses and resources may be either localized or distributed state-wide. Aquatic land uses of state-wide value provide major state-wide public benefits. Public use and access, renewable resource use and water-dependent use have been cited by the legislature as examples of such uses. Aquatic land natural resources of state-wide value are those critical or uniquely suited to aquatic land uses of state-wide value or to environmental quality. For example, wild and scenic rivers, high quality public use beaches and aquatic lands fronting state parks are of state-wide value for public use and access. Commercial clam and geoduck beds and sites uniquely suited to aquaculture are of state-wide value to renewable resource use. Harbor areas are of state-wide value to water-dependent navigation and commerce. Certain aquatic land habitats and plant and animal populations are of state-wide value to recreational and commercial fisheries, wildlife protection, and scientific study.

Discussion on state-wide value

When weighing many different possible uses of state-owned aquatic lands, especially different uses that might each provide some public benefits, the department will favor uses and resources of "state-wide value." For example, under RCW 79.90.460, "in cases of conflict between water-dependent uses, priority shall be given to...state-wide interests as distinguished from local ones." The definition above lists some things considered to be of state-wide value.

To judge whether other uses or resources have "state-wide implications," staff should consider whether there are opportunities to conduct the use elsewhere in the state away from aquatic lands, whether the resource is rare or at risk of loss in the state, and whether the use or resource significantly contributes to the public benefits of state-owned aquatic lands listed above and in RCW 79.90.455.

As described above, the department may apply "special management procedures or standards" for uses and resources of state-wide values. Within the law, the department has a great deal of authority and opportunity to be creative and flexible in managing state-owned aquatic lands, especially to ensure environmental protection, promote favored uses, and require that applicants provide for other public benefits as a condition of using these lands.

SEE ALSO: Public benefits; Water-dependent uses; Environmental protection.

Submerged artifacts

SEE: Archeological resources.

T

Theft

SEE: Unauthorized uses.

Tidelands

RCW 79.90.030: "First class tidelands."
Whenever used in chapters 79.90 through 79.96 RCW the term "first class tidelands" means the shores of navigable tidal waters belonging to the state, lying within or in front of the corporate limits of any city, or within one mile thereof upon either side and between the line of ordinary high tide and the inner harbor line; and within two miles of the corporate limits on either side and between the line of ordinary high tide and the line of extreme low tide.

RCW 79.90.035: "Second class tidelands."
Whenever used in chapters 79.90 through 79.96 RCW the term "second class tidelands" means the shores of navigable tidal waters belonging to the state, lying outside of and more than two miles from the corporate limits of any city, and between the line of ordinary high tide and the line of extreme low tide.

WAC 332-30-106 Definitions.
(63) "Second class tidelands"...To determine if the tidelands are more than two miles from the corporate limits of a city, the distance is measured along the shoreline from the intersection of the corporate limit with the shoreline.

WAC 332-30-106 Definitions.

(18) "Extreme low tide" means the line as estimated by the federal government below which it might reasonably be expected that the tide would not ebb. In Puget Sound area generally, this point is estimated by the federal government to be a point in elevation 4.50 feet below the datum plane of mean lower low water, (0.0). Along the Pacific Ocean and in the bays fronting thereon and the Strait of Juan de Fuca, the elevation ranges down to a minus 3.5 feet in several locations.
(45) "Ordinary high tide" means the same as mean high tide or the average height of high tide. In Puget Sound, the mean high tide line varies from 10 to 13 feet above the datum plane of mean lower low water (0.0).

Discussion on tidelands

Tidelands are part of state-owned aquatic lands, and generally are those areas along the shores of marine waters. In most things, they are treated identically to shorelands.
SEE ALSO: State-owned aquatic lands; Tidelands.

Tidelands and shorelands are classified as either first or second class. The class designation indicates the location of the site relative to the boundaries of incorporated city limits. First-class tidelands and shorelands are within two miles of incorporated city limits. Second-class tidelands and shorelands are more than two miles from the boundary of incorporated city limits. As city limits change, the classification of a given area of land may change. Besides location, the most important difference between first and second class tidelands and shorelands is that upland owners abutting first class tidelands and shorelands have a preference right to lease those lands. For more information on leasing preferences, SEE ALSO: Use authorizations.

For many years, tidelands were routinely sold by the state. Approximately 29 percent of the state's tidelands remain in public ownership. Within the Puget Sound basin, however, the most heavily populated area of the state, the public owns only about 18 percent of the tidelands. In 1971, the Legislature prohibited the sale of tidelands except to other public entities, and then only if the land will be used solely for

municipal or state purposes. However, the department rarely sells tidelands. For more information on sales of aquatic lands, SEE ALSO: State-owned aquatic lands.

Transient moorage

Discussion on transient moorage

Short-term or transient moorage and residence on a vessel on state-owned aquatic lands is allowed without specific department authorization. The determination of what is transient moorage, as opposed to long-term or permanent residential use which does require authorization, must be made on a case-by-case basis. The following are indicators of a transient, not permanent, residential use:

- Moorage and habitation in one location for no more than 30 consecutive days. The 30 day limit is to be strictly enforced in waterways, but also is a general indicator in other areas. SEE ALSO: Waterways.

- Moorage and habitation in one location for no more than an aggregate of 90 days in any year. "One location," in this context, means anywhere within the same marina or surrounding embayment. A change in moorage within a marina or between marinas in the same embayment or a change in anchorage within an embayment does not constitute a new location.

- The inhabitation does not meet any of the criteria for permanent residential uses. SEE ALSO: Residential uses.

The first two indicators listed above are general, flexible standards. The objective is to prevent the conversion of acceptable water-dependent activities (boating and moorage) into permanent nonwater-dependent residential uses. If one or more of these indicators suggest the presence of a

permanent residential use in a location where only transient moorage and residence is provided for, staff should conduct a site visit or other appropriate measures to determine compliance with department requirements and whether further action should be taken. This should include meeting with a marina owner, if applicable.

TRANSIENT MOORAGE: ANCHORAGES

WAC 332-30-139: Marinas and moorages.

(2) Anchorages suitable for both residential and transient use will be identified and established by the department in appropriate locations so as to provide additional moorage space.

Discussion on transient moorage: anchorages

The department may establish anchorage suitable for residential and transient use in appropriate locations. For transient uses, this amounts to establishing areas for mooring buoys. SEE ALSO: Mooring buoys.

Transmission lines

SEE: Linear projects; Utility lines.

Transportation

SEE: Commercial and industrial uses; Bridges and roads.

Trespass

SEE: Unauthorized uses.

U

Unauthorized uses

Discussion on unauthorized uses

Unauthorized uses of state-owned aquatic lands may result in financial losses to the public, adverse impact to the lands, hindrance to public use of the area, or potential increases in state liability. Certain uses of state-owned aquatic lands, such as short-term occupancy, recreational harvest of shellfish, private recreational docks, and non-damaging recreational use, are allowed without formal authorization. However, all leases of, long-term occupancy of, damages to, and removal of valuable material from state-owned aquatic lands must have approval from the department. Otherwise, they are unauthorized uses, and, as the proprietary manager of state-owned aquatic lands, the department is responsible for responding to them.

There are any number of potential unauthorized use issues the department could address. Issues to consider when resolving a trespass include the damage and loss of assets, administrative costs, the costs to pursue and resolve the trespass, the probability of success, and the preventive message to be sent. Because of limited department resources, staff should seek to address those concerns which represent the highest threats to the public's enjoyment of the benefits of state-owned aquatic lands.

As general priorities, greater attention should be paid to entities who are doing one or more of the following:

Trespassing or stealing resources;

Not complying with the terms of their lease, contract, easement or agreement in a manner which does or could cause significant adverse impacts to the environment, public use and access, or current or potential neighboring activities;

Failing to pay rent;

Failing to agree to a new lease after a lease expires;

Exposing the department to legal liability for environmental impacts or other reasons; or

Conducting activities which present public safety hazards.

In general, it is the department's goal to bring an unauthorized party into compliance before seeking legal action or penalties. If that cannot be accomplished within a reasonable time after discovering the violation, or if the other party refuses to cooperate in reaching compliance, the department will pursue enforcement options. In some cases, it may not be possible or safe to wait to bring a party into compliance and it may be necessary to more quickly pursue enforcement to stop environmental damage, to stop theft of a public resource, achieve compliance with a lease, or remove a party from the land.

If the department discovers an unauthorized use of state-owned aquatic lands, notice should immediately be given to the lessee so the department can take action to remove the use or, if appropriate, get the use authorized and begin collecting rent.

The department is investigating the use of collection agencies to address failure to pay rent.

UNAUTHORIZED USES: HARVESTING OF SEAWEED

SEE: Vegetation, aquatic

UNAUTHORIZED USES: LEASE COMPLIANCE

SEE: Use authorizations

UNAUTHORIZED USES: TAKING OF SHELLFISH

SEE: Shellfish

UNAUTHORIZED USES: TRESPASS, UNAUTHORIZED USE AND OCCUPANCY, REMOVAL OF MATERIALS, WASTE AND DAMAGE

RCW 79.01.752: Lessee or contract holder guilty of misdemeanor, when.

Every person being in lawful possession of any public lands of the state, under and by virtue of any lease or contract of purchase from the state, cuts down, destroys or injures, or causes to be cut down, destroyed or injured, any timber standing or growing thereon, or takes or removes, or causes to be taken or removed, therefrom, any wood or timber lying thereon, or maliciously injures or severs anything attached thereto, or the produce thereof, or digs, quarries, mines, takes or removes therefrom, any earth, soil, clay, sand, gravel, stone, mineral or other valuable material, or causes the same to be done, or otherwise injures, defaces or damages, or causes to be injured, defaced or damaged, any such lands unless expressly authorized so to do by the lease or contract under which he holds possession of such lands, or by the provisions of law under and by virtue of which such lease or contract was issued, shall be guilty of a misdemeanor.

RCW 79.01.760: Trespass, waste, damages --Prosecutions.

(1) Every person who, without authorization, uses or occupies public lands, removes any valuable material as defined in RCW 79.01.038 from public lands, or causes waste or damage to public lands, or injures publicly owned personal property or publicly owned improvements to real property on public lands, is liable to the state for treble the amount of the damages. However, liability shall be for single damages if the department of natural resources determines, or the person proves upon trial, that the person, at time of the unauthorized act or acts, did not know, or have reason to know, that he or she lacked authorization. Damages recoverable under this section include, but are not limited to, the market value of the use, occupancy, or things removed, had the use, occupancy, or removal been authorized; and any damages caused by injury to the land, publicly owned personal property or publicly owned improvement, including the costs of restoration. In addition, the person is liable for reimbursing the state for its reasonable costs, including but not limited to, its administrative costs, survey costs to the extent they are not included in damages awarded for restoration costs, and its reasonable attorneys' fees and other legal costs. (2) This section does not apply in any case where liability for damages is provided under RCW 64.12.030, 4.24.630, 79.01.756, or 79.40.070. (3) The department of natural resources is authorized and directed to investigate all trespasses and wastes upon, and damages to, public lands of the state, and to cause prosecutions for, and/ or actions for the recovery of, the same, to be commenced as is provided by law.

RCW 79.94.170: Construction of RCW 79.94.150 and 79.94.170-- Use and occupancy fee where unauthorized improvements placed on publicly owned aquatic lands.

Nothing in RCW 79.94.150 and 79.94.170 shall be construed to prevent the assertion of public ownership rights in any publicly owned aquatic lands, or the leasing of such aquatic lands when such leasing is not contrary to the state-wide public interest. The department of natural resources may require the payment of a use and occupancy fee in lieu of a lease where improvements have

been placed without authorization on publicly owned aquatic lands. [1982 1st ex.s. c 21 § 102.]

WAC 332-30-127: Unauthorized use and occupancy of aquatic lands (see RCW 79.01.471).

(1) Aquatic lands determined to be state owned, but occupied for private use through accident or without prior approval, may be leased if found to be in the public interest.
(2) Upon discovery of an unauthorized use of aquatic land, the responsible party will be immediately notified of his status. If the use will not be authorized, he will be served notice in writing requiring him to vacate the premises within thirty days. If the law and department policy will permit the use, the occupant is to be encouraged to lease the premises.
(3) The trespassing party occupying aquatic lands without authority will be assessed a monthly use and occupancy fee for such use beginning at the time notification of state ownership is first provided to them and continuing until they have vacated the premises or arranged for a right to occupy through execution of a lease as provided by law.
(4) The use and occupancy fee is sixty percent higher than full fair market rental and is intended to encourage either normal leasing or vacation of aquatic land.
(5) In those limited circumstances when a use cannot be authorized by a lease even though it may be in the public interest to permit the structure or activity, the fair market rental will be charged and billed on an annual basis.
(6) The use and occupancy billing is to be made after the use has occurred and conveys no rights in advance. Payment is due by the tenth of the month following the original notification, and if not received, a notice is to be sent. If payment is not received within thirty days of this notice and monthly thereafter by the tenth of each month during the period of the use and occupancy lease or if the improvement has not been removed from the aquatic land, an unlawful detainer action against the party in trespass will be filed along with an action to collect past due rental.

Discussion on unauthorized uses: trespass, unauthorized use and occupancy, removal of materials, waste, and damage

It is considered trespass on state-owned aquatic lands if an individual or entity, public or private, is found to be occupying state lands for their exclusive use, without prior approval from the department. Examples of trespass include building a pier, bulkhead, or outfall without use authorization, or taking up long-term residence or moorage without authorization. Keep in mind that some trespassers may have received the necessary permits from regulatory agencies to conduct their activities, but have not realized that they also need to get authorization from the department. SEE ALSO: Regulatory agencies and permits.

An exception is private recreational docks, which do not need a use authorization document from the department, provided they meet certain conditions. SEE ALSO: Recreational docks, private.

It is the department's goal to avoid trespass on state-owned aquatic lands as often as possible through prevention and education, and to pursue resolution of the situation without taking legal action whenever possible. In all situations, no matter whether the trespass is innocent or willful, staff should seek a solution that is in the best interests of the state, not necessarily of the trespasser.

Staff should follow these general steps in the case of trespass:

- Once an unauthorized use is discovered, immediately notify the party of the violation, then work to arrange a lease if the use is in the public interest and complies with all legal requirements.

- Until the lease is agreed upon, the trespassing party will be assessed a monthly use and occupancy fee for their use beginning at the time they receive their notice of trespass. This interim rental rate will continue until they vacate the site or arrange for a lease. To encourage the signing of a lease, this fee will be 60percent higher than fair market value.

If the use is found to be incompatible and will not be authorized, the party will be served written notice to vacate the premises within thirty days. The trespassing party will be assessed a monthly use and occupancy fee for their use beginning at the time they receive their notice of trespass and continuing until they vacate the site.

If the tenant is unwilling or hesitant to sign a lease, staff should attempt to communicate the following:
  - That any reasonable landlord (as with a house or other property) would proceed with trespass and eviction proceedings against a tenant who refuses to sign a lease.
  - The model lease is commercially reasonable and results from a thorough process to draft a lease that represents an appropriate balance of risk and liability for the department and the tenants.
  - An outside law firm and an advisory committee of private attorneys who represent aquatic tenants reviewed and edited the draft lease.
  - The department's commercial lease is comparable to commercial real estate leases, and other tenants across the state are signing it.

If the occupant still refuses to sign the lease, legal proceedings will be necessary. The department's objective is to use uniform and fair application of the lowest level of enforcement required to achieve compliance. Contact should be made through appropriate processes with the Attorney General's Office to commence legal proceedings.

In the case of any actual or threatened act of violence to any person, illegal public behavior, and acts of theft and vandalism, staff should immediately notify local law enforcement authorities.

UNAUTHORIZED USES: USES OF OTHER AGENCIES OR LAW ENFORCEMENT

Discussion on unauthorized uses: use of other agencies or law enforcement

The department's objective is to use uniform and fair application of the most appropriate level of enforcement required to achieve compliance. Staff will cooperate with other agencies having enforcement responsibility and will promptly notify local law enforcement authorities of all acts of actual or threatened violence, illegal public behavior, and acts of theft and vandalism. (Policy PO22-001)

For emergencies or actual or threatened violence, contact the appropriate law enforcement agency.

For violations affecting fish and wildlife (e.g., geoducks, salmon, etc.), including illegal harvest of geoducks, immediately contact the regional Washington Department of Fish and Wildlife (WDFW) office.

For violations occurring within the waters of the state that are either in violation of an issued Hydraulic Project Approval (HPA) or conducted without an HPA, contact the regional WDFW office. Any project using, diverting, obstructing or changing the flow of water is subject to an HPA.

For discharge violations (e.g., presence of an unpermitted outfall or of other discharges affecting water quality), contact the regional Department of Ecology office.

For unauthorized expansion of docks and other structures, contact the city or county to see whether necessary shoreline or other permits have been issued or whether a hydraulics permit has been issued by WDFW.

- For activities which appear to be contrary to the area's zoning, contact the city or county to see whether the activity has been permitted.

Use and occupancy fee

SEE: Unauthorized uses.

Use authorizations

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(4) The power to lease state-owned aquatic lands is vested in the department of natural resources, which has the authority to make leases upon terms, conditions, and length of time in conformance with the state Constitution and chapters 79.90 through 79.96 RCW.

(5) State-owned aquatic lands shall not be leased to persons or organizations which discriminate on the basis of race, color, creed, religion, sex, age, or physical or mental handicap.

RCW 79.90.410: Reconsideration of official acts.

The department of natural resources may review and reconsider any of its official acts relating to the aquatic lands of the state until such time as a lease, contract, or deed shall have been made, executed, and finally issued, and the department may recall any lease, contract, or deed issued for the purpose of correcting mistakes or errors, or supplying omissions.

WAC 332-30-106 Definitions.

(7) "Authorization instrument" means a lease, material purchase, easement, permit, or other document authorizing use of state-owned aquatic lands and/or materials.

WAC 332-30-122: Aquatic land use authorization.

All requirements in this section shall apply to the department. Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) General requirements.

(a) In addition to other requirements of law, aquatic land activities that interfere with the use by the general public of an area will require authorization from the department by way of agreement, lease, permit, or other instrument.

(i) Suitable instruments shall be required for all structures on aquatic lands except for those federal structures serving the needs of navigation.

(ii) The beds of navigable waters may be leased to the owner or lessee of the abutting tideland or shoreland. This preference lease right is limited to the area between the landward boundary of the beds and the -3 fathom contour, or 200 feet waterward, whichever is closer to shore. However, the distance from shore may be less in locations where it is necessary to protect the navigational rights of the public.

(iii) When proposing to lease aquatic lands to someone other than the abutting property owner, that owner shall be notified of the intention to lease the area. When not adverse to the public's ownership, the abutting owner's water access needs may be reasonably accommodated.

Discussion on use authorizations

The Legislature has granted broad proprietary authority to the department for leasing. Unlike regulatory actions, proprietary authority means that the department acts as a manager who leases the land to tenants on behalf of the owners – the current and future citizens of the state – rather than as a regulator of private lands.

USE AUTHORIZATIONS: ASSIGNMENTS

RCW 79.90.370: Assignment of contracts or leases.

All contracts of purchase of tidelands or shorelands belonging to the state, otherwise permitted under RCW 79.94.150 to be sold, and all leases of tidelands, shorelands, or beds of navigable waters belonging to the state issued by the department of natural resources shall be assignable in writing by the contract holder or lessee. The assignee shall be subject to the provisions of law applicable to the purchaser, or lessee, of whom he is the assignee, and shall have the same rights in all respects as the original purchaser, or lessee, of the lands, but only if the assignment is first approved by the department and entered upon the records in the office of the commissioner of public lands.

Discussion on use authorizations: assignments

Lessees may assign their lease to a new person, but only with approval of the department. Before approving an assignment, the department should consider any amendments or conditions that may better provide for environmental protection or the other public benefits of state-owned aquatic lands. The department will require any amendments or conditions that might be applied to a new lease and that are necessary to address new concerns. SEE ALSO: Public benefits.

An assignment of a lease requires approval from the same authority who signed the original lease. SEE ALSO: Chapter Two, Delegation of authority.

USE AUTHORIZATIONS: DETERMINATION OF USE IN AREA

WAC 332-30-122: Aquatic land use authorization.

(1) General requirements

(b) Determination of the area encumbered by an authorization for use shall be made by the department based on the impact to public use and subsequent management of any remaining unencumbered public land.

(i) Operations involving fixed structures will include the area physically encumbered plus the open water area needed to operate the facility.

(ii) Areas for individual mooring buoys will be a circle with a radius equal to the expected swing of the vessel or object moored. Only the area encumbered at any given point in time shall be used to calculate any rentals due.

(iii) Areas for utility line easements will normally be ten feet wider than the overall width of the structure(s) placed in the right of way.

Discussion on use authorizations: determination of use area

When leasing aquatic lands, the department will determine the area of the lease. This area will include both the area physically encumbered plus the area needed to normally operate the facility or conduct the activity. Also, when determining the area, the department must take into account the impact to public use and to future management options for surrounding state-owned aquatic lands.

The area covered by a use authorization is based on the total area of encumbered use, not by the physical size of an installed structure. For example, the mooring buoy area is the entire swing radius needed for mooring a boat. Also, marinas and docks should lease the area needed to allow ingress and egress for boats between the facility and open water. Utility lines require ten feet on either side, or whatever distance is necessary to protect both the utility line and neighboring uses. SEE ALSO: Mooring buoys and swim rafts; Marinas and moorage facilities; Utility lines.

USE AUTHORIZATIONS: FOR IMPROVEMENTS

SEE: Improvements

USE AUTHORIZATIONS: FOR MARINAS

See: Marinas and moorage facilities

USE AUTHORIZATIONS: FOR MOORING BUOYS

SEE: Mooring buoys and swim rafts

USE AUTHORIZATIONS: FOR NONWATER-DEPENDENT USES

SEE: Nonwater-dependent uses

USE AUTHORIZATIONS: FOR PUBLIC USE AND ACCESS

SEE: Public use and access

USE AUTHORIZATIONS: FOR RESIDENTIAL USES

SEE: Residential uses

USE AUTHORIZATIONS: FOR SHELLFISH CULTIVATION OR OTHER AQUACULTURE

SEE: Aquaculture

USE AUTHORIZATIONS: FOR WATER-DEPENDENT USES

SEE: Water-dependent uses

USE AUTHORIZATIONS: FOR WATER-ORIENTED USES

SEE: Water-oriented uses

USE AUTHORIZATIONS: HOLD-OVER STATUS

Discussion on use authorizations: hold-over status

If a lessee fails to extend a lease at the end of the term, continues to occupy the state-owned aquatic lands, and has not received proper instructions to vacate the lands, the lessee is called a "hold-over tenant." If the lease is in hold-over status, the tenant is lawfully using the property and is not a trespasser.

A hold-over tenancy can arise in two situations. First, there could be an approved hold-over tenancy if the tenant signed a hold-over letter. Second, the department's acceptance of a tenant's rent after expiration of the lease can be deemed by a court to be an implied hold-over.

The department should not allow hold-over tenancy to occur without deliberate discussions or rationale. It is the department's goal to keep all leases current, rather than allowing leases to continue beyond the expiration of the lease. This goal includes eliminating any leases in the hold-over status.

If the tenant has either an approved or implied hold-over, staff should send the tenant a certified letter providing at least 30 days to enter into a lease or vacate the property. This time period may be extended to no more than 60 days if

a survey, plans of operation, or other documentation is required. Staff should advise the tenant that after the proper period expires, he or she will be in trespass and subject to eviction. For information on trespassing, SEE ALSO: Unauthorized uses.

USE AUTHORIZATIONS: INSURANCE, BONDS, AND OTHER SECURITY

RCW 79.90.525: Aquatic lands--Security for leases for more than one year.

For any lease for a term of more than one year, the department may require that the rent be secured by insurance, bond, or other security satisfactory to the department in an amount not exceeding two years' rent. The department may require additional security for other lease provisions. The department shall not require cash deposits exceeding one-twelfth of the annual rental.

WAC 332-30-122: Aquatic land use authorization.

All requirements in this section shall apply to the department. Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(5) Insurance, bonds, and other security.

(a) The department may require authorized users of aquatic lands to carry insurance, bonding, or provide other forms of security as may be appropriate for the use or uses occurring on public property, in order to ensure its sustained utility and future value.

(b) Proof of coverage shall be acceptable to the department if provided by any of the following:

(i) Insurance and/or bonding companies licensed by the state;

(ii) Recognized insurance or bonding agent for the authorized user;

(iii) Savings account assignment from authorized user to department; or

(iv) Cash deposit.

(c) The amount of security required of each user shall be determined by the department and adjusted periodically as needed.

(i) Any portion of the required security relating to payment of rent or fees shall be limited to an amount not exceeding two year's rental or fees.

(ii) Required security related to other terms of the agreement shall be based on the estimated cost to the department of enforcing compliance with those terms.

(iii) Cash deposits shall not be required in an amount exceeding one-twelfth of the annual rental or fees. If this amount is less than the total required security, the remainder shall be provided through other forms listed in (b) of this subsection.

(d) Security must be provided on a continual basis for the life of the agreement. Security arrangements for less than the life of the agreement shall be accepted as long as those arrangements are kept in force through a series of renewals or extensions.

USE AUTHORIZATIONS: LEASE COMPLIANCE

Discussion on use authorizations: lease compliance

To best provide for the public benefits of state-owned aquatic lands, the department must keep lessees in compliance with applicable lease, easement or contract terms. Therefore, it is important that staff monitor all leases, contracts, and other agreements for compliance with the terms.

Monitoring for compliance is an on-going task to be completed primarily by land managers in the field. Monitoring involves routinely reviewing all leases to ensure compliance. Inspecting for compliance takes place "on-site" to make sure

the user is operating under the terms and conditions of the use authorization. All reviews should include documentation of findings, including both written summaries and photographs.

When monitoring for lease compliance, staff should follow these general steps:

First, review the use authorization, particularly the "Permitted Use" and the "Restrictions on Use" sections to understand the terms and conditions of the contract. Also, staff should review the survey or exhibit to verify that the improvements and trade fixtures are contained within the leasehold area. This review should cover the entire file, including all permits and any plan of development or operation.

Based upon the permitted use, determine whether the use and the improvements are consistent with the use authorization. For example, consider a lease where the permitted use is for vessel moorage only, where, during the inspection, houseboats are found occupying the leasehold. The houseboat use is not consistent with the use authorization. Therefore, the user is not in compliance with the permitted use section of the lease authorization terms, and a notice of non-compliance must be sent.

If necessary, examine and measure the physical improvements to ensure they are still consistent with the original lease terms. If they are not consistent, a letter of non-compliance should go to the lessee.

Review the use authorization and regulatory permits for special requirements such as pump-outs and fuel docks. Ensure that adequate safeguards are in place and functioning properly and that the user is in compliance with all permits. If there are questions or concerns, contact the appropriate permitting agency.

Ensure that the lessee is conforming to all applicable laws, regulations and permits affecting the use and occupation of the leasehold. Again, staff should review the lease jacket and note any requirements issued prior to the original authorization before conducting an on-site visit. In some instances, monitoring may uncover violations of permits issued by regulatory agencies, such as the Department of Ecology. When this happens, staff must report these violations to the appropriate agency. SEE ALSO: Regulatory agencies and permits.

Notify someone with expertise if it is suspected that the lessee is not complying with the specific technical-oriented environmental provisions of the lease or of specific laws. This will help ensure that any hazardous, toxic or harmful substances on the site are in compliance with lease terms and the requirements of other agencies. If the lessee is not in compliance, notify the Department of Ecology's regional office or the Hazardous Substance Information line at 800-633-7585. Observing oil on the water or drum barrels sitting on the docks are examples of indications of hazards. SEE ALSO: Regulatory agencies and permits.

Confirm that the lessee has not granted any rights to a third party, such as a sublease, without prior authorization.

Verify that improvements are maintained and in compliance with all applicable building and zoning codes, and shoreline management, health, safety and environmental laws, and other legal requirements. For example, if pilings are broken or deteriorating, staff should identify that the pilings need to be replaced or fixed. Newer leases should contain a "Plan of Development, Operation and Maintenance." Staff should ensure compliance with the approved plan, including repairs, upgrades, scheduled inspections, etc.

- # Identify any obvious health or safety hazards (i.e., wiring, rotting walkways, broken pilings, etc.). If any hazards are identified, contact the user and require compliance. Later, staff should follow up to confirm the hazard has been corrected by contacting the regulatory agency for confirmation or doing another on-site visit.

- # If human health or the environment are at imminent risk, immediately take whatever steps are appropriate to protect health and safety.

- # Once non-compliance has been identified, develop a time-frame for correcting the deficiencies, then follow up with either an on-site inspection or obtain proof that deficiencies have been corrected.

When a lessee fails to adhere to the terms and conditions of the lease, including rent payments and insurance obligations, this may result in a "default" or breach of contract. In most cases, the tenant is formally in breach once the department so notifies the tenant. Generally, a tenant may be in default or breach of contract when any of the following situations occur:

- # Failure to pay annual rent or other expenses when due.

- # Failure to comply with any appropriate law, regulation, policy, or order of any governmental authority.

- # Failure to comply with any other provision in the contract.

- # Proceedings are commenced by or against the tenant under any bankruptcy act or for the appointment of a trustee or receiver of tenants' property. This final item is important because there may be a limited "window of opportunity" to recover debt from a tenant in bankruptcy. Although federal law prevents a landlord from declaring a tenant in default and terminating solely on the basis of

a bankruptcy, this may be the best opportunity to take appropriate action to force the lessee to cure the default.

When a default occurs, staff must give the tenant written notice of the default, and demand that it be corrected. If the tenant does not correct the default within the designated time period for doing so, the department will try and bring the tenant into compliance with the terms and conditions of the lease. There are several steps for doing this, including:

- # Review the use authorization document for lease terms and conditions. Once familiar with this, document the violation in writing, sending a copy to the Region Manager. Photographing the violation (e.g., expansion of dock beyond what was originally authorized, presence of outfall, harvest of geoducks, etc.) is strongly recommended.

- # Notify the tenant of the violation both in writing (via certified mail with a return receipt), and, if possible, in person or by telephone. The tenant may volunteer to correct the violation immediately. In these cases, work with the tenants to help bring them into compliance. Advise them they have a number of days as specified in the lease (typically 10 days for rent, 30 or 60 days for other defaults) to submit delinquent payments and other defaults.

- # It is also important for staff to notify any lenders of record that have a secured interest in the lease. The lender may wish to cure the default to protect its collateral.

If the tenant does not rectify the problem within the allotted time frame, staff, in consultation with the Region Manager and others as necessary, may initiate the procedures for legal action against the tenant (see Procedure No. 3-01, 12/9/97) or take another course of definitive action appropriate to the circumstances. However, if the lease violation is resulting in imminent harm to the lands or resources, it may be

necessary to enlist the help of enforcement officials or the help of other agencies to halt the activity immediately.

If a lease has been assigned and the assignee is violating the terms of the lease, staff should also contact the assignor, as they may have a continuing interest in the lease.

The department may call in the tenant's security bond if the tenant is in default or is otherwise violating lease conditions.

USE AUTHORIZATIONS: LEASE CONDITIONS

Discussion on use authorizations: lease conditions

Another key part of the department's authority is that the department will only lease state-owned aquatic lands "if the department of natural resources shall deem it for the best public interest to offer said [lands] for lease." Also, "the department shall, prior to the issuance of any lease...prescribe the terms and conditions of the lease." These quotes are from RCW 79.94.070 and RCW 79.94.280 on first class shorelands and tidelands, but virtually identical language also applies to all other state-owned aquatic lands.

The purpose and effect of this authority is that the department can and will be creative and flexible in leasing in order to provide for the public benefits of state-owned aquatic lands. Our obligation is not to lease lands; it is to best manage them for the public, which may or may not include leasing a particular parcel for a particular use.

Furthermore, our obligation is to the entire public. The department must manage state-owned aquatic lands not just for the convenience of lessees, but for all the citizens of the state. To do this, the department will require all conditions necessary within a lease to best provide for the public benefits of state-owned aquatic lands. SEE ALSO: Public benefits.

USE AUTHORIZATIONS: LEASE OF BEDLANDS

RCW 79.95.010: Lease of beds of navigable waters.

Except as provided in RCW 79.95.060, the department of natural resources may lease to the abutting tide or shore land owner or lessee, the beds of navigable waters lying below the line of extreme low tide in waters where the tide ebbs and flows, and below the line of navigability in lakes and rivers claimed by the state and defined in section 1, Article XVII, of the Constitution of the state. In case the abutting tide or shore lands or the abutting uplands are not improved or occupied for residential or commercial purposes, the department may lease such beds to any person for a period not exceeding ten years for booming purposes. Nothing in this chapter shall change or modify any of the provisions of the state Constitution or laws of the state which provide for the leasing of harbor areas and the reservation of lands lying in front thereof. [Note: The exception provided for in RCW 79.95.060 applies only to the United States Navy in Port Gardner Bay.]

RCW 79.95.020: Lease of beds of navigable waters--Terms and conditions of lease--Forfeiture for nonuser.

The department of natural resources shall, prior to the issuance of any lease under the provisions of this chapter, fix the annual rental and prescribe the terms and conditions of the lease: PROVIDED, That in fixing such rental, the department shall not take into account the value of any improvements heretofore or hereafter placed upon the lands by the lessee. No lease issued under the provisions of this chapter shall be for a term longer than thirty years from the date thereof if in front of second class tide or shore lands; or a term longer than ten years if in front of unplatted first class tide or shore lands leased under the provisions of RCW 79.94.280, in which case said lease shall be subject to the same terms and conditions as provided for in the lease of such unplatted first class tide or shore lands. Failure to use those beds leased under the provisions of this chapter for booming purposes, for a period of two years shall work a forfeiture of said lease and the land shall revert to the state without notice to the lessee upon the

entry of a declaration of forfeiture in the records of the commissioner of public lands.

RCW 79.95.030: Lease of beds of navigable waters--Improvements--Federal permit--Forfeiture--Plans and specifications.

The applicant for a lease under the provisions of this chapter shall first obtain from the United States Army Corps of Engineers or other federal regulatory agency, a permit to place structures or improvements in said navigable waters and file with the department of natural resources a copy of said permit. No structures or improvements shall be constructed beyond a point authorized by the Corps of Engineers or the department of natural resources and any construction beyond authorized limits will work a forfeiture of all rights granted by the terms of any lease issued under the provisions of this chapter. The applicant shall also file plans and specifications of any proposed improvements to be placed upon such areas with the department of natural resources, said plans and specifications to be the same as provided for in the case of the lease of harbor areas.

RCW 79.95.040: Lease of beds of navigable waters--Preference right to re-lease.

At the expiration of any lease issued under the provisions of this chapter, the lessee or his successors or assigns, shall have a preference right to re-lease the area covered by the original lease or any portion thereof if the department of natural resources deems it to be in the best interest of the state to re-lease the same. Such re-lease shall be for such term as specified by the provisions of this chapter, and at such rental and upon such conditions as may be prescribed by the department: PROVIDED, That if such preference right is not exercised, the rights and obligations of the lessee, the department of natural resources, and any subsequent lessee shall be the same as provided in RCW 79.94.320 relating to failure to re-lease tide or shore lands. Any person who prior to June 11, 1953, had occupied and improved an area subject to lease under this chapter and has secured a permit for such improvements from the United States Army Corps of Engineers, or other federal regulatory agency, shall have the rights and obligations of a lessee under this section upon the filing of a

copy of such permit together with plans and specifications of such improvements with the department of natural resources.

USE AUTHORIZATIONS: LEASE OF HARBOR AREAS OR WATERWAYS

Discussion on use authorizations: lease of harbor areas or waterways.

Leases in harbor areas and waterways are similar to other leases, but also follow many unique rules. SEE ALSO: Harbor areas; Waterways.

USE AUTHORIZATIONS: LEASE OF TIDELANDS AND SHORELANDS

RCW 79.94.070: Tidelands and shorelands of the first class-- Preference right of upland owner--How exercised.

Upon platting and appraisal of tidelands or shorelands of the first class as in this chapter provided, if the department of natural resources shall deem it for the best public interest to offer said tide or shore lands of the first class for lease, the department shall cause a notice to be served upon the owner of record of uplands fronting upon the tide or shore lands to be offered for lease if he be a resident of the state, or if he be a nonresident of the state, shall mail to his last known post office address, as reflected in the county records, a copy of the notice notifying him that the state is offering such tide or shore lands for lease, giving a description of those lands and the department's appraised fair market value of such tide or shore lands for lease, and notifying such owner that he has a preference right to apply to lease said tide or shore lands at the appraised value for the lease thereof for a period of sixty days from the date of service of mailing of said notice. If at the expiration of sixty days from the service or mailing of the notice, as above provided, there being no conflicting applications filed, and the owner of the uplands fronting upon the tide or shore lands offered for lease, has failed to avail himself of his preference right to apply to lease or to pay to the department the appraised value

for lease of the tide or shore lands described in said notice, then in that event, said tide or shore lands may be offered for lease to any person and may be leased in the manner provided for in the case of lease of state lands. If at the expiration of sixty days two or more claimants asserting a preference right to lease shall have filed applications to lease any tract, conflicting with each other, the conflict between the claimants shall be equitably resolved by the department of natural resource[s] as the best interests of the state require in accord with the procedures prescribed by chapter 34.05 RCW: PROVIDED, That any contract purchaser of lands or rights therein, which upland qualifies the owner for a preference right under this section, shall have first priority for such preference right.

RCW 79.94.150: First and second class tidelands and shorelands and waterways of state to be sold only to public entities-- Leasing--Limitation.

(1) This section shall apply to:

(a) First class tidelands as defined in RCW 79.90.030;

(b) Second class tidelands as defined in RCW 79.90.035;

(c) First class shorelands as defined in RCW 79.90.040;

(d) Second class shorelands as defined in RCW 79.90.045, except as included within RCW 79.94.210;

(e) Waterways as described in RCW 79.93.010.

(3) Tidelands and shorelands enumerated in subsection (1) of this section may be leased for a period not to exceed fifty-five years: PROVIDED, That nothing in this section shall be construed as modifying or canceling any outstanding lease during its present term.

RCW 79.94.260: Second class shorelands--Sale or lease when in best public interest--Preference right of upland owner--Procedure upon determining sale or lease not in best public interest or where transfer made for public use--Platting.

If application is made to purchase or lease any shorelands of the second class and the department of natural resources shall deem it for the best public interest to offer said shorelands of the second class for sale or lease, the department shall cause a notice to be served upon the abutting upland owner if he be a resident of the state, or if the upland owner be a nonresident of the state, shall

mail to his last known post office address, as reflected in the county records a copy of a notice notifying him that the state is offering such shorelands for sale or lease, giving a description of the department's appraised fair market value of such shorelands for sale or lease, and notifying such upland owner that he has a preference right to purchase, if such purchase is otherwise permitted under RCW 79.94.150, or lease said shorelands at the appraised value thereof for a period of thirty days from the date of the service or mailing of said notice. If at the expiration of the thirty days from the service or mailing of the notice, as provided in this section, the abutting upland owner has failed to avail himself of his preference right to purchase, as otherwise permitted under RCW 79.94.150, or lease, or to pay to the department the appraised value for sale or lease of the shorelands described in said notice, then in that event, except as otherwise provided in this section, said shorelands may be offered for sale, when otherwise permitted under RCW 79.94.150, or offered for lease, and sold or leased in the manner provided for the sale or lease of state lands, as otherwise permitted under this chapter. The department of natural resources shall authorize the sale or lease, whether to abutting upland owners or others, only if such sale or lease would be in the best public interest and is otherwise permitted under RCW 79.94.150. It is the intent of the legislature that whenever it is in the best public interest, the shorelands of the second class managed by the department of natural resources shall not be sold but shall be maintained in public ownership for the use and benefit of the people of the state. In all cases where application is made for the lease of any second class shorelands adjacent to upland, under the provisions of this section, the same shall be leased per lineal chain frontage, and the United States field notes of the meander line shall accompany each application as required for the sale of such lands, and when application is made for the lease of second class shorelands separated from the upland by navigable waters, the application shall be accompanied by the plat and field notes of a survey of the lands applied for, as required with applications for the purchase of such lands. If, following an application by the abutting upland owner to either purchase as otherwise permitted under RCW 79.94.150 or to obtain an exclusive lease at appraised full market value or rental, the department deems that such sale or lease is not in the best public interest, or if property rights in state-owned

second class shorelands are at any time withdrawn, sold, or assigned in any manner authorized by law to a public agency for a use by the general public, the department shall within one hundred and eighty days from receipt of such application to purchase or lease, or on reaching a decision to withdraw, sell or assign such shorelands to a public agency, and:
(1) Make a formal finding that the body of water adjacent to such shorelands is navigable;
(2) find that the state or the public has an overriding interest inconsistent with a sale or exclusive lease to a private person, and specifically identify such interest and the factor or factors amounting to such inconsistency; and
(3) provide for the review of said decision in accordance with the procedures prescribed by chapter 34.05 RCW. Notwithstanding the above provisions, the department may cause any of such shorelands to be platted as is provided for the platting of shorelands of the first class, and when so platted such lands shall be sold, when otherwise permitted under RCW 79.94.150 to be sold, or leased in the manner provided for the sale or lease of shorelands of the first class.

RCW 79.94.280: First class unplatted tide or shore lands-- Lease preference right to upland owners--Lease for booming purposes.

The department of natural resources is authorized to lease to the abutting upland owner any unplatted first class tide or shore lands. The department shall, prior to the issuance of any lease under the provisions of this section, fix the annual rental for said tide or shore lands and prescribe the terms and conditions of the lease. No lease issued under the provisions of this section shall be for a longer term than ten years from the date thereof, and every such lease shall be subject to termination upon ninety days' notice to the lessee in the event that the department shall decide that it is in the best interest of the state that such tide or shore lands be surveyed and platted. At the expiration of any lease issued under the provisions of this section, the lessee or his successors or assigns shall have a preference right to re-lease the lands covered by the original lease or any portion thereof, if the department shall deem it to be in the best interests of the state to re-lease the same, for succeeding periods not exceeding five years each at such rental and upon such terms and

conditions as may be prescribed by said department. In case the abutting uplands are not improved and occupied for residential purposes and the abutting upland owner has not filed an application for the lease of such lands, the department may lease the same to any person for booming purposes under the terms and conditions of this section: PROVIDED, That failure to use for booming purposes any lands leased under this section for such purposes for a period of one year shall work a forfeiture of such lease and such land shall revert to the state without any notice to the lessee upon the entry of a declaration of forfeiture in the records of the department of natural resources.

RCW 79.94.290: Second class tide or shore lands--Lease for booming purposes.

The department of natural resources is authorized to lease any second class tide or shore lands, whether reserved from sale, or from lease for other purposes, by or under authority of law, or not, except any oyster reserve containing oysters in merchantable quantities, to any person, for booming purposes, for any term not exceeding ten years from the date of such lease, for such annual rental and upon such terms and conditions as the department may fix and determine, and may also provide for forfeiture and termination of any such lease at any time for failure to pay the fixed rental or for any violation of the terms or conditions thereof. The lessee of any such lands for booming purposes shall receive, hold, and sort the logs and other timber products of all persons requesting such service and upon the same terms and without discrimination, and may charge and collect tolls for such service not to exceed seventy-five cents per thousand feet scale measure on all logs, spars, or other large timber and reasonable rates on all other timber products, and shall be subject to the same duties and liabilities, so far as the same are applicable, as are imposed upon boom companies organized under the laws of the state: PROVIDED, That failure to use any lands leased under the provisions of this section for booming purposes for a period of one year shall work a forfeiture of such lease, and such lands shall revert to the state without any notice to the lessee upon the entry of a declaration of forfeiture in the records of the department. At the expiration of any lease issued under the provisions of this section, the lessee shall have the preference right to re- lease the lands covered by his original lease for a further term, not

exceeding ten years, at such rental and upon such terms and conditions as may be prescribed by the department of natural resources. [1982 1st ex.s. c 21 § 114.]

RCW 79.94.320: Tide or shore lands of the first or second class--Failure to re-lease tide or shore lands--Appraisal of improvements.

In case any lessee of tide or shore lands, for any purpose except mining of valuable minerals or coal, or extraction of petroleum or gas, or his successor in interest, shall after the expiration of any lease, fail to purchase, when otherwise permitted under RCW 79.94.150 to be purchased, or re-lease from the state the tide or shore lands formerly covered by his lease, when the same are offered for sale or re-lease, then and in that event the department of natural resources shall appraise and determine the value of all improvements existing upon such tide or shore lands at the expiration of the lease which are not capable of removal without damage to the land, including the cost of filling and raising said property above high tide, or high water, whether filled or raised by the lessee or his successors in interest, or by virtue of any contract made with the state, and also including the then value to the land of all existing local improvements paid for by such lessee or his successors in interest. In case the lessee or his successor in interest is dissatisfied with the appraised value of such improvements as determined by the department, he shall have the right of appeal to the superior court of the county wherein said tide or shore lands are situated, within the time and according to the method prescribed in RCW 79.90.400 for taking appeals from decisions of the department. In case such tide or shore lands are leased, or sold, to any person other than such lessee or his successor in interest, within three years from the expiration of the former lease, the bid of such subsequent lessee or purchaser shall not be accepted until payment is made by such subsequent lessee or purchaser of the appraised value of the improvements as determined by the department, or as may be determined on appeal, to such former lessee or his successor in interest. In case such tide or shore lands are not leased, or sold, within three years after the expiration of such former lease, then in that event, such improvements existing on the lands at the time of any subsequent lease, shall belong to the state and be considered a part of the land, and shall be taken into

consideration in appraising the value, or rental value, of the land and sold or leased with the land.

USE AUTHORIZATIONS: LENGTH OF TERM

RCW 79.94.150: First and second class tidelands and shorelands and waterways of state to be sold only to public entities-- Leasing--Limitation.

RCW 79.94.280: First class unplatted tide or shore lands-- Lease preference right to upland owners--Lease for booming purposes.

RCW 79.95.010: Lease of beds of navigable waters.

RCW 79.95.020: Lease of beds of navigable waters--Terms and conditions of lease--Forfeiture for nonuser.

[Note: The full texts of these RCWs is printed above under *Lease of tidelands and shorelands* and *Lease of bedlands*.]

Discussion on use authorizations: length of term

In summary of the above RCWs:

- Tidelands and shorelands may be leased for up to 55 years. Except, first class unplatted tidelands and shorelands may be leased for up to 10 years.

- Bedlands abutting second class tidelands or shorelands may be leased for up to 30 year. Except, unimproved bedlands abutting second class tidelands or shorelands may be leased to any person for up to 10 years for log booming purposes.

Bedlands abutting first class unplatted tidelands or shorelands may be leased for up to 10 years, under the same conditions as for those tidelands or shorelands.

The department generally does not grant leases for longer than 30 years. It may grant a lease for up to 100 years for major public facilities. The department does not grant perpetual easements under any circumstances.

Any lease for longer than 12 years, including leases with renewal options totaling more than 12 years, require final approval from the Commissioner of Public Lands. SEE ALSO: Chapter Two, Delegation of authority.

USE AUTHORIZATIONS: PLAN OF OPERATIONS

Discussion on use authorizations: plan of operations

Exhibit B of the standard use authorization form calls for a plan of operations. The purpose of this document is to ensure that the lessee properly plans how the site will be used over the term of the lease and also documents the short and long-term objectives for the site. Staff should work with the proponent to develop the plan of operations to make sure that the department's needs and concerns for the long-term use of the site are properly addressed. In some cases, the applicant may already have a plan of operations, also sometimes called an operation and maintenance manual. In this case, staff should review the existing manual to determine if anything should be added or amended to meet department goals.

As part of this process, staff should walk the site with the proponent and look for opportunities to improve the proposal to better provide for the public benefits of state-owned aquatic lands and better meet the department's stewardship

responsibilities. The plan of operations should provide for documentation of the actions, mitigation, maintenance and improvements that will occur and when, so that the site can be monitored appropriately.

"Best management practices" and "all known and reasonable technology" set by regulatory agencies for the use requested should be required as minimum standards, and should be included in the plan of operations or elsewhere in the documentation of the agreement. SEE ALSO: Regulatory agencies and permits.

When appropriate, the plan of operations should also include:

- A maintenance schedule.
- An emergency management plan, indicating the required response to spills, leaks or similar occurrences.
- Steps to be taken to ensure environmental protection, such as a sediment sampling plan, pressure testing schedule and other monitoring plans. SEE ALSO: Environmental protection.

USE AUTHORIZATIONS: PREFERENCE RIGHTS FOR LEASING

RCW 79.94.070: Tidelands and shorelands of the first class-- Preference right of upland owner--How exercised.

RCW 79.94.260: Second class shorelands--Sale or lease when in best public interest--Preference right of upland owner--Procedure upon determining sale or lease not in best public interest or where transfer made for public use--Platting.

RCW 79.94.280: First class unplatted tide or shore lands-- Lease preference right to upland owners--Lease for booming purposes.

RCW 79.95.010: Lease of beds of navigable waters.

[Note: The full text of these RCWs is printed above under *Lease of tidelands and shorelands* and *Lease of bedlands*.]

WAC 332-30-122: Aquatic land use authorization.

(1) General requirements.

(a) In addition to other requirements of law, aquatic land activities that interfere with the use by the general public of an area will require authorization from the department by way of agreement, lease, permit, or other instrument.

(ii) The beds of navigable waters may be leased to the owner or lessee of the abutting tideland or shoreland. This preference lease right is limited to the area between the landward boundary of the beds and the -3 fathom contour, or 200 feet waterward, whichever is closer to shore. However, the distance from shore may be less in locations where it is necessary to protect the navigational rights of the public.

Discussion on use authorizations: preference rights for leasing

In summary of the RCWs and WAC above:

- The owner of uplands abutting first class or second class tidelands or shorelands has a limited preference right for leasing those lands. Before leasing a parcel of tidelands or shorelands, the department must notify the abutting upland owner (or owners, if the aquatic parcel abuts several upland parcels) of the fair market rental value at which the land may be leased. That owner then has 60 days, in the case of first class tidelands and shorelands, or has 30 days, in the case of second lass tidelands and shorelands, to apply for a lease at that rental amount. If the upland owner does not apply within that time or does not follow through on leasing the parcel, the preference right is lost, after which the department may lease the land to any person.

- The owner of uplands abutting unplatted first class tidelands or shorelands has a slightly different limited preference right. These lands may be leased to this owner by the same process as above, but such a lease may be terminated upon 90 days notice if the department decides it is in the best interests of the state to survey and plat the lands.

- Bedlands may be leased only to the owner of abutting private tidelands or shorelands or the lessee of abutting public tidelands or shorelands. However, this does not apply in harbor areas. SEE ALSO: Harbor areas. Note that the right to lease is limited by the need to protect navigation.

- If the abutting tidelands, shorelands, or uplands are not improved or occupied, the department may lease the bedlands to any person for log booming purposes.

All these leasing preferences apply only if the department determines it to be in the best interest of the state to lease the land at all. That is, the preference right is not an automatic right for anyone to lease abutting state-owned aquatic lands if the department does not make that determination. Also, all applications to lease state-owned aquatic lands will be judged by the same standards, regardless of whether the application is from an abutting owner or lessee who may have a preference right.

USE AUTHORIZATIONS: PROCESS STEPS

Discussion on use authorizations: process steps

The process for considering and preparing a use authorization includes a variety of steps for review and

evaluation along with steps for document preparation. Much of the latter is contained in the Use Authorization Training Manual (sometimes referred to as the Gordon Thomas Honeywell manual) and the Use Authorization Desk Manual. In general, the process includes:

- Receipt of the initial application, discovery of a project through SEPA or other regulatory review process, and/or discovery of a trespass. This should include confirmation that the project is located on state-owned aquatic lands.

- Initial screening for acceptance of the application. The applicant will be expected to provide the information necessary for the department to fairly evaluate the application.

- Coordination with other Divisions of the department for consideration of any upland portion of the same proposal.

- Coordination with other agencies, as appropriate. SEE ALSO: Regulatory agencies and permits.

- Determination of the appropriate level of notification and decision-making within the department, and the relevant roles for the Region, the Division, and Executive Management. SEE ALSO: Chapter Two, Delegation of authority.

- Initial calculation of a potential valuation, proposed contract duration, and other special terms or conditions. SEE ALSO: Rent; Valuation.

- Consideration of all reasonable alternative uses.

- If additional guidance beyond this manual is needed, obtaining appropriate Executive Management review and guidance.

- Preliminary negotiation with the applicant, if appropriate.

- Obtaining the necessary department approvals before making formal or informal commitments to the applicant. If the lease is especially complicated or controversial, or if extensive negotiation will be needed with the applicant, it may be appropriate to send a preliminary recommendation to the Region Manager, Supervisor or Commissioner before staff prepares a final lease document.

- If the proposal receives preliminary approval pending final determination of value, determine the preferred method of setting valuation. SEE ALSO: Rent; Valuation.

- If the proposal receives preliminary approval pending final negotiation with the applicant, then final negotiation with the applicant.

- If the proposal receives final approval, then preparing necessary documents to execute the use authorization and obtaining signatures and payments. It should be made clear to the applicant that the contract is not valid until all proper signatures, payments, and similar requirements are completed.

- If the use authorization is executed, administering the terms of the contract over time and responding to breaches or other events. SEE ALSO: Unauthorized uses.

- Notifying the applicant and any other interested parties of the decision, regardless of whether the proposal was approved or disapproved.

- Preparing a Record of Decision, regardless of whether the proposal was approved or disapproved.

The Use Authorization Desk Manual and the Use Authorization Training Manual should be followed for

specific instructions and procedures on collecting and completing the appropriate documents.

USE AUTHORIZATIONS: RECORD KEEPING

Discussion on use authorizations: record keeping

Decisions to approve or deny a use authorization must be thoroughly documented and accessible in department files. The agency files on specific use authorizations must include all relevant documents pertaining to each use authorization, including any drafts and handwritten comments, documentation of decisions and rationale, site and vicinity maps, photos, blueprints, surveys, and plans of operations.

All information related to a given use authorization — including the department's lease or easement documents, and the data and records required by regulatory agencies — should use the same references and geographic coordinates. Documents should be cross-referenced, and duplication should be minimized.

The official file on each use authorization is maintained in the Land Records Office in Olympia. Region files should also be maintained for easy access. Region staff should routinely reconcile these files, to ensure they are working with the most up-to-date information.

The department will establish routine and random auditing to assure compliance with conditions specified in use authorizations, and to assure that records are kept appropriately.

The department will compile an annual report to executive management on all use authorizations on state-owned aquatic lands, including information relevant to reporting and

monitoring timelines. One of the purposes of this annual report is to help the department and other agencies determine total and cumulative impacts from these uses to state-owned aquatic lands.

USE AUTHORIZATIONS: REGULATORY PERMITS

WAC 332-30-122: Aquatic land use authorization.

(1) General requirements

(c) All necessary federal, state and local permits shall be acquired by those proposing to use aquatic lands. Copies of permits must be furnished to the department prior to authorizing the use of aquatic lands. When evidence of interest in aquatic land is necessary for application for a permit, an authorization instrument may be issued prior to permit approval but conditioned on receiving the permit.

Discussion on use authorizations: regulatory permits

Regulatory requirements are the minimum standard for use of state-owned aquatic lands. Within its proprietary authority, the department can and will exceed regulatory requirements when necessary to uphold its statutory obligations in managing state-owned aquatic lands. SEE ALSO: Regulatory agencies and permits.

USE AUTHORIZATIONS: RE-LEASING

RCW 79.94.280: First class unplatted tide or shore lands-- Lease preference right to upland owners--Lease for booming purposes.

RCW 79.94.290: Second class tide or shore lands--Lease for booming purposes.

RCW 79.94.320: Tide or shore lands of the first or second class--Failure to re-lease tide or shore lands--Appraisal of improvements.

RCW 79.95.040: Lease of beds of navigable waters--Preference right to re-lease.

[Note: The full texts of these RCWs is printed above under *Lease of tidelands and shorelands* and *Lease of bedlands*.]

Discussion on use authorizations: re-leasing

In summary of these RCWs:

- For unplatted first class tidelands or shorelands, the lessee has the preference to re-lease for up to five years.
- For second class tidelands or shorelands leased for booming purposes, the lessee has the preference to re-lease for up to five years.

- For bedlands, the lessee has the preference to re-lease, under the same rules as for the original lease.

As with the original leases, all these re-leasing preferences apply only if the department determines it to be in the best interest of the state to lease the land at all. That is, the preference right is not an automatic right for anyone to re-lease abutting state-owned aquatic lands if the department does not make that determination. Also, the department may require new conditions or terms in the re-lease to account for environmental concerns or other issues that are apparent at the time of re-lease.

Re-leases will follow the same general rules and procedures as for new leases. An application for re-lease must be judged based on current land management standards, not the

standards that applied when the original lease was granted. This often may mean that the existing structures or operations of the lessee will need to be improved or upgraded to meet current statutes, regulations, and policies. While it may inconvenience lessees, or even discourage some from re-leasing, this requirement is essential for continuously improving the management of aquatic lands under the department's stewardship and for meeting the department's statutory obligations.

Lessees in harbor areas and lessees for shellfish cultivation and aquaculture have slightly different re-lease rules. SEE ALSO: Harbor areas; Aquaculture.

Some older leases include a contractual preference right to re-lease. Contractual preference rights should not be included in future leases. Staff should check the specifics of the contract to determine the obligations of the lessee and the department. Unless prohibited by specific clauses in the contract, the department should require that the lease be upgraded to current land management standards.

If a lessee fails to re-lease tidelands or shorelands, the improvements on those lands either will be sold to the new lessee or, if the lands are not leased for three years, will become the property of the state and be managed by the department. SEE ALSO: Improvements.

USE AUTHORIZATIONS: TYPES OF AUTHORIZATIONS

Discussion on use authorizations: types of authorizations

The department can grant several types of authorization instruments, including:

- Leases
- Easements, or rights-of-way

Rights-of-Entry

A lease is the most comprehensive type of authority granting use of state-owned aquatic lands. A lessee gains the general right to use the lands for the purposes described in the lease, subject to other specific provisions of the lease. Leases, rather than other forms of use authorization, should be used when the lessee requires essentially exclusive use of the leased lands. One typical provision allows the department to grant other uses of the leased land, such as an easement, but only if these uses will not unreasonably interfere with the lessee's use. The term “lease” is commonly used to refer to all types of use authorizations, even if they are actually easements or rights-of-entry.

An easement, also known as a right-of-way, is a more limited grant of authority to use state-owned aquatic lands. Easements are typically provided for utility lines or similar uses which do not fully encumber the land. In other words, the department may still be able to authorize other uses on the land. Easements may be granted across already leased lands, so long as the easement does not unreasonably interfere with the lease. The area covered by an easement will normally be ten feet wider than any structure placed in the easement.

A right-of-entry grants a temporary revocable license for the licensee to enter the property for limited purposes. This license is not exclusive to the licensee, and the department may grant similar rights in the same area to another licensee. Rights-of-entry are typically used when the licensee requests to use the property only temporarily.

A right-of-entry may sometimes be granted when a licensee wishes to install a structure or equipment. If this structure or equipment will remain after the right-of-entry expires, and the structure or equipment would normally require authorization, then a subsequent lease or easement is required. For example, a party may request a right-of-entry to a large area of aquatic lands in order to construct a project

which ultimately will encumber only a smaller area. In this case, the final lease or easement need only cover the smaller area. The department will not authorize a right-of-entry which is associated with a lease or easement until that lease or easement is also agreed to and finalized, except with Executive Management approval. Executive Management approval will most commonly be given for public utility lines. SEE ALSO: Utility lines.

USE AUTHORIZATIONS: UNAUTHORIZED USES

Discussion on use authorizations: unauthorized uses

If a lessee uses state-owned aquatic lands in a manner contrary to their authorization, or damages or removes valuable materials from leased state-owned aquatic lands when the damage or removal is not authorized by the lease, the lessee could be charged with a misdemeanor. For more information on trespass, waste, damage, removal of materials, and unauthorized use and occupancy on state-owned aquatic lands, SEE ALSO: Unauthorized uses.

USE AUTHORIZATIONS: WITHHOLDING LANDS FROM LEASING

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(3) The department shall consider the natural values of state-owned aquatic lands as wildlife habitat, natural area preserve, representative ecosystem, or spawning area prior to issuing any initial lease or authorizing any change in use. The department may withhold from leasing lands which it finds to have significant natural values, or may provide within any lease for the protection of such values.

Discussion on use authorizations: withholding lands from leasing

A key part of the department's broad proprietary authority is the authority **not** to lease lands or restrict leases in order to protect significant natural values of state-owned aquatic lands. The department will require all conditions necessary to ensure protection of the aquatic environment. SEE ALSO: State-owned aquatic lands; Reserves, aquatic; Environmental protection.

Utility lines

RCW 79.91.130: Right of way for utility pipelines, transmission lines, etc.

A right of way through, over and across any tidelands, shorelands, beds of navigable waters, oyster reserves belonging to the state, or the reversionary interest of the state in oyster lands may be granted to any person or the United States of America, constructing or proposing to construct, or which has heretofore constructed, any telephone line, ditch, flume, or pipeline for the domestic water supply of any municipal corporation or transmission line for the purpose of generating or transmitting electricity for light, heat or power.

RCW 79.91.140: Right of way for utility pipelines, transmission lines, etc.--Procedure to acquire.

In order to obtain the benefits of the grant made in RCW 79.91.130, the person or the United States of America constructing or proposing to construct, or which has heretofore constructed, such telephone line, ditch, flume, pipeline, or transmission line, shall file, with the department of natural resources, a map accompanied by the field notes of the survey and location of such telephone line, ditch, flume, pipeline, or transmission line, and shall make payment therefor as provided in RCW 79.91.150. The land within the right of way shall be limited to an amount necessary for the construction of said telephone line, ditch, flume, pipeline, or transmission line sufficient for the

purposes required, together with sufficient land on either side thereof for ingress and egress to maintain and repair the same. The grant shall also include the right to cut all standing timber outside the right of way marked as danger trees located on public lands upon full payment of the appraised value thereof.

RCW 79.91.150: Right of way for utility pipelines, transmission lines, etc.--Appraisal--Certificate--Reversion for nonuser.

On the filing of the plat and field notes, as provided in RCW 79.91.140, the land applied for and any improvements included in the right of way applied for, if any, shall be appraised as in the case of an application to purchase state lands. Upon full payment of the appraised value of the aquatic land applied for, or upon payment of an annual rental when the department of natural resources deems a rental to be in the best interests of the state, and upon full payment of the appraised value of any danger trees and improvements, if any, the department shall issue to the applicant a certificate of the grant of such right of way stating the terms and conditions thereof and shall enter the same in the abstracts and records in the office of the commissioner of public lands, and thereafter any sale or lease of the lands affected by such right of way shall be subject to the easement of such right of way: PROVIDED, That should the person or the United States of America securing such right of way ever abandon the use of the same for the purposes for which it was granted, the right of way shall revert to the state, or the state's grantee.

WAC 332-30-122: Aquatic land use authorization.

All requirements in this section shall apply to the department. Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) General requirements.

(b) Determination of the area encumbered by an authorization for use shall be made by the department based on the impact to public use and subsequent management of any remaining unencumbered public land.

(iii) Areas for utility line easements will normally be ten feet wider than the overall width of the structure(s) placed in the right of way.

Discussion on utility lines

Utility lines are one form of linear project and one form of nonwater-dependent use. SEE ALSO: Linear projects; Nonwater-dependent uses. Outfalls may require additional conditions to account for greater potential environmental impacts. SEE ALSO: Outfalls.

The department will grant a right-of-way for utility lines across state-owned aquatic lands upon payment of full market value for the right of way and for any damage to affected aquatic lands. SEE ALSO: Valuation.

In granting an easement for utility line, the department may require terms in the easement to provide for navigation and commerce, ensure environmental protection, and provide for the department's other statutory obligations and the public benefits of state-owned aquatic lands. In reviewing these applications, the department should apply the same standards as for other linear projects or nonwater-dependent uses. SEE ALSO: Public benefits; Navigation; Environmental protection.

Ideally, the department should be involved in advance in the design and permitting process to create and take advantage of opportunities to improve the utility line design. In fact, the department should consult with state and local agencies on their capital project plans at least five years in advance of construction. If possible, the department should also consider alternate locations where a utility line could be located to serve the same purpose with lesser impacts. If a utility line requires regulatory environmental permits, these must be granted before the department will issue the final easement document. SEE ALSO: Regulatory agencies and permits.

Damages for which payment is due include both the initial impacts associated with construction of a utility line and any impacts which occur later as a direct result of the utility line. For example, damages would be due for digging a trench, and for any major or chronic spill that disrupted aquatic habitat. Damage payments may be in the form of non-monetary habitat or environmental enhancements, or public access, if approved by the department. The easement must include a mechanism for obtaining damage payments after initial construction of the utility line.

Utility line easements will be granted for up to 30 years. Like other linear projects, the department will require re-opener clauses that allow the department to re-evaluate relevant aspects of the lease at least every ten years to respond to unexpected navigational or environmental concerns. Where appropriate, the re-opener clause should be tied to the schedule of applicable regulatory environmental reviews. If an easement is reopened, the department will require that the government agency cover the costs of any necessary review or utility line alterations.

UTILITY LINES: PUBLICLY-OWNED

RCW 79.90.465: Definitions.

(10) "Public utility lines" means pipes, conduits, and similar facilities for distribution of water, electricity, natural gas, telephone, other electronic communication, and sewers, including sewer outfall lines.

RCW 79.90.470 Aquatic lands -- Use for public utility lines -- Use for public parks or public recreation purposes -- Lease of tidelands in front of public parks.

The use of state-owned aquatic lands for public utility lines owned by a governmental entity shall be granted without charge by an agreement, permit, or other instrument if the use is consistent with the purposes of RCW 79.90.450 through 79.90.460 and does not obstruct navigation or other public uses. Use for public parks or public recreation purposes shall be granted without charge if

the aquatic lands and improvements are available to the general public on a first-come, first-served basis and are not managed to produce a profit for the operator or a concessionaire. The department may lease state-owned tidelands that are in front of state parks only with the approval of the state parks and recreation commission. The department may lease bedlands in front of state parks only after the department has consulted with the state parks and recreation commission.

Discussion on utility lines: publicly owned

Government entities will receive easements for utility lines free of charge, as long as they meet the same standards as other utility lines. This will include terms in the easement to provide for navigation and commerce, ensure environmental protection, and provide for the department's other statutory obligations and the public benefits of state-owned aquatic lands. Note that a “public utility line” is granted a free easement only if it is actually owned by a government; that is, lines that serve the general public but are owned by a private company require full payment. Public utility lines include outfalls. SEE ALSO: Outfalls.

V

Valuation

WAC 332-30-122: Aquatic land use authorization.
(3) Rents and fees.

(a) When proposed uses of aquatic lands requiring an authorization instrument (other than in harbor areas) have an identifiable and quantifiable but acceptable adverse impact on state-owned aquatic land, both within and without the authorized area, the value of that loss or impact shall be paid by the one so authorized in addition to normal rental to the department or port as is appropriate.

(b) Normal rentals shall be calculated based on the classification of the aquatic land use(s) occurring on the property. Methods for each class of use are described in specific WAC sections.

WAC 332-30-106 Definitions.
(19) "Fair market value" means the amount of money which a purchaser willing, but not obligated, to buy the property would pay an owner willing, but not obligated, to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied (Donaldson v. Greenwood, 40 Wn.2d 238, 1952). Such uses must be consistent with applicable federal, state and local laws and regulations affecting the property as of the date of valuation.

Discussion on valuation

The department has the responsibility to ensure that Washington citizens receive a fair return in exchange for granting exclusive use of state-owned aquatic lands to private parties or other government agencies. A decision on the value or rent for use of aquatic lands is separate from the

decision on whether a proposed use is appropriate for state-owned aquatic land.

The method and purpose of determining a value for state-owned aquatic lands varies greatly, depending on the use.

For some uses of state-owned aquatic lands, rents are established by statute. The valuation process is set forth in these statutes and accompanying regulations. These uses include:

- Water-dependent uses. SEE ALSO: Water-dependent uses.
- Log storage. SEE ALSO: Log booming and storage.
- Public parks. SEE ALSO: Public use and access.
- Public utility lines. SEE ALSO: Utility lines.
- Disposal of dredged materials. SEE ALSO: Sediments.

In other situations, either statutes do not specify rent or a rent formula, or the department has other reasons to determine a value or rent for these lands. In general, the department is to charge “fair market rental value,” which may vary greatly with the land, the use, and the circumstances. In these situations, the department has greater discretion on valuation, and the department's approach to valuation will have greater impact on the public benefits provided by aquatic lands. These situations are:

- Nonwater-dependent uses, including residential uses, hotels, contaminated sediment disposal sites, and other uses that could be located on uplands. SEE ALSO: Nonwater-dependent uses; Residential uses; Sediments.

- Linear projects involving easements or rights-of-way for roads, bridges, private outfalls and utility lines, and fiber optic cables. SEE ALSO: Linear projects; Bridges and roads; Outfalls; Utility lines.

- Exchanges of aquatic lands to ensure that the land received by the state is of at least equal market value

and of greater public benefit than the land given up. SEE ALSO: Exchanges and acquisitions.

Natural resource damage assessments and trespasses, to calculate the land or resource value lost due to harm to or unauthorized uses on state-owned aquatic lands. SEE ALSO: Natural resource damage assessments; Unauthorized uses.

Aquaculture or mining. These require a rent determination only when the user will control the land for a period of time, and will not just harvest the resource. SEE ALSO: Aquaculture; Mining and prospecting.

The Division is working to develop more complete guidance on valuation as it applies to fair market rental value and to the many circumstances where there is no strict statutory formula. Until this guidance is complete, staff should apply these general principles:

The method for determining valuation should be consistent from case to case, even if the results of that method vary with the specific circumstances.

The department must maintain the contractual rights and practical capacity to negotiate additional compensation as appropriate in the future, such as from increases in service from the project.

The department should use consistent valuation methodologies between upland and aquatic programs, though the values for each portion of the project may not be identical.

When two or more projects are in a combined area or corridor, the department will require payment of full market value rent from each project separately.

Applicable valuation examples can be found elsewhere on state-owned aquatic lands or state-owned uplands, or from other agencies, other states or other landowners.

The department should consider, at a minimum, these elements of valuation:

The uses that are currently occurring on the land, and are planned for the future, and the effect of the project on those uses.

The value of services or facilities that may be provided by the department, such as an existing corridor.

Legal, financial, or environmental liabilities that currently exist, may exist or may be created by the project.

The value of the proposed linear project to every party, both financial and as a benefit or service, clearly identifying who realizes that value and how;

Changes in service and income that may occur for this linear project in the future that might affect the value appropriately received by the state.

VALUATION: NONWATER-DEPENDENT RENT

SEE: Nonwater-dependent uses.

VALUATION: RENT

SEE: Rent.

VALUATION: WATER-DEPENDENT RENT

SEE: Water-dependent uses.

Vegetation, aquatic

RCW 79.01.800: Seaweed--Marine aquatic plants defined.

Unless the context clearly requires otherwise, the definition in this section applies throughout this chapter. "Marine aquatic plants" means saltwater marine plant species that are dependent upon the marine aquatic or tidal environment, and exist in either an attached or free-floating state. Marine aquatic plants include but are not limited to seaweed of the classes Chlorophyta, Phaeophyta, and Rhodophyta.

RCW 79.01.805: Seaweed--Personal use limit--Commercial harvesting prohibited--Exception--Import restriction.

(1) The maximum daily wet weight harvest or possession of seaweed for personal use from all aquatic lands as defined under RCW 79.90.010 and all privately owned tidelands is ten pounds per person. The department of natural resources in cooperation with the department of fish and wildlife may establish seaweed harvest limits of less than ten pounds for conservation purposes. This section shall in no way affect the ability of any state agency to prevent harvest of any species of marine aquatic plant from lands under its control, ownership, or management.
(2) Except as provided under subsection (3) of this section, commercial harvesting of seaweed from aquatic lands as defined under RCW 79.90.010, and all privately owned tidelands is prohibited. This subsection shall in no way affect commercial seaweed aquaculture.
(3) Upon mutual approval by the department and the department of fish and wildlife, seaweed species of the genus Macrocystis may be commercially harvested for use in the herring spawn-on-kelp fishery.
(4) Importation of seaweed species of the genus Macrocystis into Washington state for the herring spawn-on-kelp fishery is subject to the fish and shellfish disease control policies of the department of fish and wildlife. Macrocystis shall not be imported from areas with fish or shellfish diseases associated with organisms that are likely to be transported with Macrocystis. The department shall

incorporate this policy on Macrocystis importation into its overall fish and shellfish disease control policies.

RCW 79.01.810: Seaweed--Harvest and possession violations-- Penalties and damages.

It is unlawful to exceed the harvest and possession restrictions imposed under RCW 79.01.805. A violation of this section is a misdemeanor punishable in accordance with RCW 9.92.030, and a violation taking place on aquatic lands is subject to the provisions of RCW 79.01.760. A person committing a violation of this section on private tidelands which he or she owns is liable to the state for treble the amount of damages to the seaweed resource, and a person trespassing on private tidelands and committing a violation of this section is liable to the private tideland owner for treble the amount of damages to the seaweed resource. Damages recoverable include, but are not limited to, damages for the market value of the seaweed, for injury to the aquatic ecosystem, and for the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

RCW 79.01.815: Seaweed--Enforcement.

The department of fish and wildlife and law enforcement authorities may enforce the provisions of RCW 79.01.805 and 79.01.810.

WAC 332-30-154: Marine aquatic plant removal (RCW 79.68.080).

[Note: The harvest amount restrictions in RCW 79.01.805 contradict WAC 332-30-154, and the RCW takes precedence.]
(1) Any species of aquatic plant may be collected from aquatic land for educational, scientific and personal purposes up to 50 pounds wet weight per year, except that no annual species can be collected in excess of fifty percent of its population's total wet weight in any 1 acre area or any perennial in excess of seventy-five percent of its population's total wet weight in any 1 acre area.
(2) Aquatic plants listed on the commercial species list may be collected without a permit from aquatic land for commercial purposes up to the limits noted on the list, except that no annual species can be collected in excess of fifty percent of its

population's total wet weight in any 1 acre area or any perennial in excess of seventy-five percent of its population's total wet weight in any 1 acre.

(3) Aquatic plants may be collected from aquatic land for educational, scientific or personal purposes beyond the weight limitations stated in subsection (1) only through benefit of an aquatic plant removal permit from the department. Payment of a royalty dependent on species, volume and use shall be a condition of the permit.

(4) Aquatic plants as listed on the commercial species list may be collected from aquatic land for commercial purposes beyond the weight limitations stated in subsection (2) only through benefit of an aquatic plant removal permit from the department. Payment of a royalty dependent on species, volume and use shall be a condition of the permit.

(5) Aquatic plants may not be removed from the San Juan Marine Reserve except as provided for in RCW 28B.20.320 and from other areas where prohibited.

(6) Removal of perennial plants must be in such a manner as to maintain their regeneration capability at the site from which they have been collected.

(7) Species may be deleted or added to the commercial species list through petition to the department.

(8) Species not on the commercial species list may be collected for purposes of market testing, product development, or personal use through either written authorization from the department or through an aquatic plant removal permit depending on the amount of plant material required.

(9) Commercial species list.

Species Name	Maximum Free Collection Weight
Alaria marginata Post. et Rupr	50 pounds wet weight
Cymathere triplicata (Post.et Rupr) J.Ag	50 pounds wet weight
Gracilaria sjoestedtii Kylin . .	10 pounds wet weight
Gracilaria verrucosa (Huds) Papenf	10 pounds wet weight
Iridaea cordata (Turner) Bory	50 pounds wet weight

Laminaria dentigera (Kjellm.) (L. setchellii Silva)	50 pounds wet weight
Laminaria groenlandica Rosenvinge	50 pounds wet weight
Laminaria saccharina (L.) Lamouroux	100 pounds wet weight
Macrocystis integrifolia Bory.	100 pounds wet weight
Monostroma spp.	20 pounds wet weight
Neoagardhiella baileyi . (Harvey et Kutzing) Wynne et Taylor	30 pounds wet weight
Porphyra spp. . .	10 pounds wet weight
Ulva spp	20 pounds wet weight

(10) Harvesting of fishery resources adhering to marine aquatic plants, such as fish eggs, must be according to the law and as specified by the department of fisheries. A permit may also be required according to WAC 332-30-154(4).

Discussion on vegetation, aquatic

Aquatic vegetation – also known as seaweed or marine aquatic plants – includes a variety of marine aquatic plant species that are dependent upon the marine aquatic or tidal environment, and exist in either an attached or free floating form. It forms the base of the aquatic food web and provides critical functions for aquatic environments by providing food, shelter, and spawning grounds for a variety of fish and other marine organisms. Kelp and eelgrass, two major types of aquatic plants found in Washington, provide food and habitat for fish, invertebrates, birds and marine mammals, and also help protect the shoreline from wave energy.

Most vegetated aquatic habitat is on land managed by the department. The importance of aquatic vegetation has been

recognized by the Growth Management Act in the requirement that counties develop plans to protect critical aquatic habitat such as eelgrass, kelp, and salt marsh plants. SEE ALSO: Growth Management Act.

To survive and thrive, aquatic plants need the right type of substrate, wave exposure, salinity, light and nutrients. Changes in these essential elements can damage or kill the plants. These plants also can be damaged by physical destruction, poor water quality, shading from structures, decrease in light levels because of increased sediment or plankton/algae in the water, a change in wave exposure, or a change in substrate type. The department is committed to protecting aquatic vegetation as part of ensuring environmental protection on aquatic lands. SEE ALSO: Environmental protection.

Aquatic vegetation can be harvested recreationally. However, the harvest amount restrictions in RCW 79.01.805 contradict WAC 332-30-154. The RCW takes precedence, so recreational harvest of seaweed is limited to 10 pounds and commercial harvest is prohibited, regardless of the WAC. An exception is Macrocystis (giant kelp), which is used for the commercial herring-roe-on-kelp fishery. However, there has been no recent roe fishery because of the current status of herring stocks. The Washington Department of Fish and Wildlife (WDFW) enforces RCW 79.01.805, and recreational seaweed harvesting requires a personal use/seaweed license issued by the WDFW. SEE ALSO: Regulatory agencies and permits.

W

Water-dependent uses

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(1) The management of state-owned aquatic lands shall preserve and enhance water-dependent uses. Water-dependent uses shall be favored over other uses in aquatic land planning and in resolving conflicts between competing lease applications. In cases of conflict between water-dependent uses, priority shall be given to uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters, and to state-wide interests as distinguished from local interests.

(2) Nonwater-dependent use of state-owned aquatic lands is a low-priority use providing minimal public benefits and shall not be permitted to expand or be established in new areas except in exceptional circumstances where it is compatible with water-dependent uses occurring in or planned for the area.

RCW 79.90.465: Definitions.

(1) "Water-dependent use" means a use which cannot logically exist in any location but on the water. Examples include, but are not limited to, water-borne commerce; terminal and transfer facilities; ferry terminals; watercraft sales in conjunction with other water-dependent uses; watercraft construction, repair, and maintenance; moorage and launching facilities; aquaculture; log booming; and public fishing piers and parks.

Discussion on water-dependent uses

Water-dependent uses are to be strongly encouraged and fostered on state-owned aquatic lands. These uses include

many traditional economic activities that make use of the water, but also other activities such as recreation and aquaculture. Fostering water-dependent uses also includes managing other activities to accommodate them, for example, to prevent nonwater-dependent uses from gradually displacing water-dependent uses.

Water-dependent uses, however, are only one of the many public benefits of state-owned aquatic lands that the department is responsible for providing. In particular, the department must ensure environmental protection, in part by considering and protecting the natural values of any use that is authorized. The department must encourage public access, provide for use of renewable resources, and generate revenue consistent with the other benefits. In addition, the department must meet constitutional requirements to provide for navigation and commerce. There will be many times when the department must restrict even water-dependent uses to provide for these other benefits and uses. SEE ALSO: Public benefits; Environmental protection; Navigation and commerce.

The definition in RCW 79.90.465 is not an exhaustive list of water-dependent uses. The key to deciding what is or is not a water-dependent use is determining whether the use must be on the water itself. If the activity would merely be more convenient to have on the water, but does not need to be there, it is not water-dependent. Also, if the activity should be near the water, but does not need to be on it, it is not water-dependent. Instead, it will be water-oriented or nonwater-dependent.

Many uses that may appear to be water-dependent are actually water-oriented. Water-oriented uses are those which historically have been dependent on a waterfront location, but could now be located elsewhere. For example, loading or unloading raw materials such as fish, wood or petroleum between a boat and a dock is water-dependent, but processing these materials in a waterfront factory is water-oriented. The difference is that the factory could be

moved adjoining uplands (or even to distant uplands). The department makes the determination of what is or is not water-dependent. SEE ALSO: Water-oriented uses; Nonwater-dependent uses.

WATER-DEPENDENT USES: RENT

RCW 79.90.480: Determination of annual rent rates for lease of aquatic lands for water-dependent uses--Marina leases.

Except as otherwise provided by this chapter, annual rent rates for the lease of state-owned aquatic lands for water-dependent uses shall be determined as follows:

(1) (a) The assessed land value, exclusive of improvements, as determined by the county assessor, of the upland tax parcel used in conjunction with the leased area or, if there are no such uplands, of the nearest upland tax parcel used for water-dependent purposes divided by the parcel area equals the upland value.

(b) The upland value times the area of leased aquatic lands times thirty percent equals the aquatic land value.

(2) As of July 1, 1989, and each July 1 thereafter, the department shall determine the real capitalization rate to be applied to water-dependent aquatic land leases commencing or being adjusted under subsection (3)(a) of this section in that fiscal year. The real capitalization rate shall be the real rate of return, except that until June 30, 1989, the real capitalization rate shall be five percent and thereafter it shall not change by more than one percentage point in any one year or be more than seven percent or less than three percent.

(3) The annual rent shall be:

(a) Determined initially, and redetermined every four years or as otherwise provided in the lease, by multiplying the aquatic land value times the real capitalization rate; and

(b) Adjusted by the inflation rate each year in which the rent is not determined under subsection (3)(a) of this section.

(4) If the upland parcel used in conjunction with the leased area is not assessed or has an assessed value inconsistent with the purposes of the lease, the nearest comparable upland parcel used

for similar purposes shall be substituted and the lease payment determined in the same manner as provided in this section.

(5) For the purposes of this section, "upland tax parcel" is a tax parcel, some portion of which has upland characteristics. Filled tidelands or shorelands with upland characteristics which abut state-owned aquatic land shall be considered as uplands in determining aquatic land values.

(6) The annual rent for filled state-owned aquatic lands that have the characteristics of uplands shall be determined in accordance with RCW 79.90.500 in those cases in which the state owns the fill and has a right to charge for the fill.

WAC 332-30-123: Aquatic land use rentals for water-dependent uses.

All requirements in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114). The annual rental for water-dependent use leases of state-owned aquatic land shall be: The per unit assessed value of the upland tax parcel, exclusive of improvements, multiplied by the units of lease area multiplied by thirty percent multiplied by the real rate of return. Expressed as a formula, it is: UV x LA x .30 x r= AR.

Each of the letter variables in this formula have specific criteria for their use as described below. This step by step presentation covers the typical situations within each section first, followed by alternatives for more unique situations.

(1) Overall considerations.

(a) Criteria for use of formula. The formula:

(i) Shall be applied to all leases having structural uses that require a physical interface with upland property when a water-dependent use occurs on such uplands (in conjunction with the water-dependent use on the aquatic lands);

(ii) Shall be used for remote moorage leases by selecting an upland parcel as detailed in subsection (2) of this section;

(iii) Shall not be used for areas of filled state-owned aquatic lands having upland characteristics where the department can charge rent for such fills (see WAC 332-30-125), renewable and nonrenewable resource uses,

or areas meeting criteria for public use (see WAC 332-30-130); and

(iv) Shall cease being used for leases intended for water-dependent uses when the lease area is not actively developed for such purposes as specified in the lease contract. Rental in such situations shall be determined under the appropriate section of this chapter.

(b) Criteria for applicability to leases. The formula shall be used to calculate rentals for:

(i) All new leases and all pending applications to lease or re-lease as of October 1, 1984;

(ii) All existing leases, where the lease allows calculation of total rent by the appropriate department methods in effect at the time of rental adjustment. Leases in this category previously affected by legislated rental increase limits, shall have the formula applied on the first lease anniversary date after September 30, 1984. Other conditions of these leases not related to rent shall continue until termination or amendment as specified by the lease contract. Leases in this category not previously affected by legislated rental increase limits and scheduled for a rent adjustment after October 1, 1985, shall have the option of retaining the current rent or electing to pay the formula rent under the same conditions as specified in (iii) of this subsection.

(iii) Leases containing specific rent adjustment procedures or schedules shall have the rent determined by the formula when requested by the lessee. Holders of such leases shall be notified prior to their lease anniversary date of both the lease contract rent and formula rent. A selection of the formula rent by the lessee shall require an amendment to the lease which shall include all applicable aquatic land laws and implementing regulations.

(2) Physical criteria of upland tax parcels.

(a) Leases used in conjunction with and supportive of activities on the uplands. The upland tax parcel used shall be waterfront and have some portion with upland characteristics. If no upland tax parcel meets these criteria, then an alternative shall be selected under the criteria of subsection (4) of this section.

(b) Remote moorage leases. The upland tax parcel used shall be waterfront, have some portion with upland characteristics; and

(i) If the remote moorage is associated with a local upland facility, be an appropriate parcel at the facility; or

(ii) If the remote moorage is similar in nature of use to moorages in the area associated with a local upland facility, be an appropriate parcel at the facility; or

(iii) If the remote moorage is not associated with a local upland facility, be the parcel closest in distance to the moorage area.

(c) Priority of selection. If more than one upland tax parcel meets the physical criteria, the priority of selection shall be:

(i) The parcel that is structurally connected to the lease area;

(ii) The parcel that abuts the lease area;

(iii) The parcel closest in distance to the lease area. If more than one upland tax parcel remains after this selection priority, then each upland tax parcel will be used for its portion of the lease area. If there is mutual agreement with the lessee, a single upland tax parcel may be used for the entire lease area. When the unit value of the upland tax parcels are equal, only one upland tax parcel shall be used for the lease area.

(d) The unit value of the upland tax parcel shall be expressed in terms of dollars per square foot or dollars per acre, by dividing the assessed value of the upland tax parcel by the number of square feet or acres in the upland tax parcel. This procedure shall be used in all cases even if the value attributable to the upland tax parcel was assessed using some other unit of value, e.g., front footage, or lot value. Only the "land value" category of the assessment record shall be used; not any assessment record category related to improvements.

(3) Consistent assessment. In addition to the criteria in subsection (2) of this section, the upland tax parcel's assessed value must be consistent with the purposes of the lease and method of rental establishment. On this basis, the following situations will be considered inconsistent and shall either require adjustment as specified, or selection of an alternative upland tax parcel under subsection (4) of this section:

(a) The upland tax parcel is not assessed. (See chapter 84.36 RCW Exemptions);

(b) Official date of assessment is more than four years old. (See RCW 84.41.030);

(c) The "assessment" results from a special tax classification not reflecting fair market value. Examples include classifications under: State-regulated utilities (chapter 84.12 RCW), Reforestation lands (chapter 84.28 RCW), Timber and forest lands (chapter 84.33 RCW), and Open space (chapter 84.34 RCW). This inconsistency may be corrected by substituting the full value for the parcel if such value is part of the assessment records;

(d) If the assessed valuation of the upland tax parcel to be used is under appeal as a matter of record before any county or state agency, the valuation on the assessor's records shall be used, however, any changes in valuation resulting from such appeal will result in an equitable adjustment of future rental;

(e) The majority of the upland tax parcel area is not used for a water-dependent purpose. This inconsistency may be corrected by using the value and area of the portion of the upland tax parcel that is used for water-dependent purposes if this portion can be segregated from the assessment records; and

(f) The size of the upland tax parcel in acres or square feet is not known or its small size results in a nominal valuation, e.g., unbuildable lot.

(4) Selection of the nearest comparable upland tax parcel. When the upland tax parcel does not meet the physical criteria or has an inconsistent assessment that can't be corrected from the assessment records, an alternative upland tax parcel shall be selected which meets the criteria. The nearest upland tax parcel shall be determined by measurement along the shoreline from the inconsistent upland tax parcel.

(a) The alternative upland tax parcel shall be located by order of selection priority:

(i) Within the same city as the lease area, and if not applicable or found;

(ii) Within the same county and water body as the lease area, and if not found;

(iii) Within the same county on similar bodies of water, and if not found;

(iv) Within the state.

(b) Within each locational priority of (a) of this subsection, the priority for a comparable upland tax parcel shall be:

(i) The same use class within the water-dependent category as the lease area use;

(ii) Any water-dependent use within the same upland zoning;

(iii) Any water-dependent use; and

(iv) Any water-oriented use.

(5) Aquatic land lease area. The area under lease shall be expressed in square feet or acres.

(a) Where more than one use class separately exist on a lease area, the formula shall only be applied to the water-dependent use area. Other use areas of the lease shall be treated according to the regulations for the specific use.

(b) If a water-dependent and a nonwater-dependent use exist on the same portion of the lease, the rent for such portion shall be negotiated taking into account the proportion of the improvements each use occupies.

(6) Real rate of return.

(a) Until July 1, 1989, the real rate of return to be used in the formula shall be five percent.

(b) On July 1, 1989, and on each July 1 thereafter the department shall calculate the real rate of return for that fiscal year under the following limitations:

(i) It shall not change by more than one percentage point from the rate in effect for the previous fiscal year; and

(ii) It shall not be greater than seven percent nor less than three percent.

(7) Annual inflation adjustment of rent. The department shall use the inflation rate on a fiscal year basis e.g., the inflation rate for calendar year 1984 shall be used during the period July 1, 1985 through June 30, 1986. The rate will be published in a newspaper of record. Adjustment to the annual rent of a lease shall occur on the anniversary date of the lease except when the rent is redetermined under subsection (9) of this section. The inflation adjustment each year is the inflation rate times the previous year's rent except in cases of stairstepping.

(9) The annual rental shall be redetermined by the formula every four years or as provided by the existing lease language. If an existing lease calls for redetermination of rental during an initial stairstepping period, it shall be determined on the scheduled date and applied (with inflation adjustments) at the end of the initial stairstep period.

Discussion on water-dependent uses: rent

Water-dependent uses of state-owned aquatic lands must pay rent to the state based on the water-dependent rent formula. The purpose of this formula is to establish "equitable and predictable lease rates for users of state-owned aquatic lands," and to foster water-dependent uses by granting rents below fair market value, as provided in RCW 79.90.450 and RCW 79.90.455. This formula applies only to uses that meet the definition of water-dependent. SEE ALSO: Public benefits.

Under the formula, the annual rent per acre of aquatic land equals the value of an acre of a comparable upland parcel, times thirty percent, times the real capitalization rate. Rents are determined every four years and adjusted for inflation in intervening years, unless otherwise provided for in the lease. The real capitalization rate is evaluated and re-set at least every two years to reflect current economic conditions. Currently, it is about 6 percent.

If a parcel of state-owned aquatic lands has been filled and now has the characteristics of uplands, and if the state owns the fill and has the right to charge rent for it, then the rent is instead determined as if the use is nonwater-dependent. This is true no matter the use. SEE ALSO: Fill; Nonwater-dependent uses.

Log storage is a water-oriented use, but log storage rents are based on a special variation of the water-dependent rent formula. In contrast, log booming follows the regular water-dependent rent formula. SEE ALSO: Log storage; Log booming.

The procedures for determining water-dependent rent, included for determining the upland tax parcel, are detailed in WAC 332-30-123, below.

WATER-DEPENDENT USES: RENT, ANNUAL ADJUSTMENTS

RCW 79.90.490: Rent for leases in effect October 1, 1984.

...Thereafter [after October 1, 1984], notwithstanding any other provision of this title, the annual rental established under RCW 79.90.480 or 79.90.485 shall not increase more than fifty percent in any year. This section applies only to leases of state-owned aquatic lands subject to RCW 79.90.480 or 79.90.485.

Discussion on water-dependent uses: rent, annual adjustments

If the annual water-dependent rent adjustment based on the inflation rate and capitalization rate would cause a rent increase of more than 50 percent for a given lessee, the actual rent due from that lessee will increase by only 50 percent. In future years, the rent is to be adjusted as if the full rent increase had been made. Therefore, the department must calculate the fully adjusted rent, even if the lessee is paying less actual rent under this statute.

WATER-DEPENDENT USES: RENT INVOLVING NONWATER-DEPENDENT USES

RCW 79.90.505: Aquatic lands--Rents for multiple uses.

If water-dependent and nonwater-dependent uses occupy separate portions of the same leased parcel of state-owned aquatic land, the rental rate for each use shall be that established for such use by this chapter, prorated in accordance with the proportion of the whole parcel that each use occupies. If water-dependent and

nonwater-dependent uses occupy the same portion of a leased parcel of state-owned aquatic land, the rental rate for such parcel shall be subject to negotiation with the department taking into account the proportion of the improvements each use occupies.

RCW 79.90.510: Aquatic lands--Lease for water-dependent use-- Rental for nonwater-dependent use.

If a parcel leased for water-dependent uses is used for an extended period of time, as defined by rule of the department, for a nonwater-dependent use, the rental for the nonwater-dependent use shall be negotiated with the department.

Discussion water-dependent uses: rent involving nonwater-dependent uses

If a water-dependent use is conducted together with or in the same space as a nonwater-dependent use, or if a lease for a water-dependent use is instead used for nonwater-dependent activities, the rent must be adjusted to account for the nonwater-dependent use. In these cases, rent for the nonwater-dependent portion is to be negotiated between the department and the tenant.

Nonwater-dependent uses must pay rent based on fair market value and also must meet much stricter standards than water-dependent uses to be allowed at all. The department may choose not to authorize a nonwater-dependent use if it does not meet the requirements for such use. Also, depending on the circumstances, the department may cancel a lease if it is improperly changed to nonwater-dependent use. SEE ALSO: Nonwater-dependent uses.

Water-oriented uses

RCW 79.90.465: Definitions.

The definitions in this section apply throughout chapters 79.90 through 79.96 RCW.
(2) "Water-oriented use" means a use which historically has been dependent on a waterfront location, but with existing technology could be located away from the waterfront. Examples include, but are not limited to, wood products manufacturing, watercraft sales, fish processing, petroleum refining, sand and gravel processing, log storage, and house boats. For the purposes of determining rent under this chapter, water-oriented uses shall be classified as water-dependent uses if the activity either is conducted on state-owned aquatic lands leased on October 1, 1984, or was actually conducted on the state-owned aquatic lands for at least three years before October 1, 1984. If, after October 1, 1984, the activity is changed to a use other than a water-dependent use, the activity shall be classified as a nonwater-dependent use. If continuation of the existing use requires leasing additional state-owned aquatic lands and is permitted under the shoreline management act of 1971, chapter 90.58 RCW, the department may allow reasonable expansion of the water-oriented use.

Discussion on water-oriented uses

Water-oriented uses are mid-way between water-dependent and nonwater-dependent uses. The water-oriented classification was established to “grandfather” some uses of aquatic lands and to protect investments in development that traditionally had utilized a waterfront location but no longer need to and are no longer encouraged there.

A water-oriented use will be treated as either a water-dependent use or a nonwater-dependent use, based on the date it was established. Specifically, if the use was conducted on that site on October 1, 1984, or if it was conducted on that site for at least three years total before October 1, 1984, then that use will be treated as if it were water-dependent. SEE ALSO: Water-dependent uses.

A water-oriented use established or changed after October 1, 1984, however, is to be treated as if it were nonwater-dependent. Also, if the original water-oriented use existing on October 1, 1984 is changed to a different

water-oriented use, then the new water-oriented use would be treated as if it were nonwater-dependent. SEE ALSO: Nonwater-dependent uses.

If a water-oriented use existed for three years total before October 1, 1984, but not on October 1, 1984, then the tenant may change the use back to the original water-oriented use and still have it treated as if it were water-dependent. However, this opportunity is limited. If the tenant first changes the use to something else before then changing it back to the original water-oriented use, then that water-oriented use will now be considered newly established and will be treated as if it were nonwater-dependent.

If a water-oriented use is treated as a nonwater-dependent use, it must pay rent as a nonwater-dependent use and also must meet the strict standards for authorizing nonwater-dependent uses in the first place. The statutory definition of water-oriented uses draws a clear distinction between water-oriented and water-dependent uses by saying that water-oriented uses "could be located away from the waterfront." This suggests that, in this characteristic, water-oriented uses are equivalent to nonwater-dependent uses. This definition also states that water-oriented uses "historically [have] been dependent on a waterfront location." Accordingly, to account for this historic dependence, the statute provides for treating historically existing water-oriented uses as water-dependent. Therefore, the department will treat water-oriented uses which were **not** historically existing as nonwater-dependent uses for all purposes, including for determining rent and for determining whether the use should be authorized at all.

If a water-oriented use is to be treated as a nonwater-dependent use, the department will approach an application for lease or re-lease of state-owned aquatic lands based on the same strict requirements for nonwater-dependent uses. These include rejection of an application if:

- There are no qualifying exceptional circumstances;

- The use is incompatible with existing or planned water-dependent uses;
- The use will conflict with the other public benefits of aquatic lands, or with any aquatic uses or resources of state-wide value; or
- The use will cause significant adverse environmental impacts.

The department makes the determination of whether a use proposed for or existing on state-owned aquatic lands is water-oriented and whether it should now be treated as if it were water-dependent or nonwater-dependent. The applicant has the burden of proof to show that the use was established before October 1, 1984.

Watershed planning

SEE: Aquatic land use planning.

Waterways

RCW 79.93.010: First class tide and shore lands to be platted--Public waterways and streets.

It shall be the duty of the department of natural resources simultaneously with the establishment of harbor lines and the determination of harbor areas in front of any city or town, or as soon thereafter as practicable, to survey and plat all tide and shore lands of the first class not heretofore platted, and in platting the same to lay out streets which shall thereby be dedicated to public use, subject to the control of the cities or towns in which they are situated. The department shall also establish one or more public waterways not less than fifty nor more than one thousand feet wide, beginning at the outer harbor line and extending inland across the tidelands belonging to the state. These waterways shall include within their boundaries, as nearly as practicable, all navigable streams running through such tidelands, and shall be located at such other places as in the

judgment of the department may be necessary for the present and future convenience of commerce and navigation. All waterways shall be reserved from sale or lease and remain as public highways for watercraft until vacated as provided for in this chapter. The department shall appraise the value of such platted tide and shore lands and enter such appraisals in its records in the office of the commissioner of public lands.

RCW 79.93.040: Permits to use waterways.

If the United States government has established pierhead lines within a waterway created under the laws of this state at any distance from the boundaries established by the state, structures may be constructed in that strip of waterway between the waterway boundary and the nearest pierhead line only with the consent of the department of natural resources and upon such plans, terms, and conditions and for such term as determined by the department. However, no permit shall extend for a period longer than thirty years. The department may cancel any permit upon sixty days' notice for a substantial breach by the permittee of any of the permit conditions. If a waterway is within the territorial limits of a port district, the duties assigned by this section to the department may be exercised by the port commission of such port district as provided in RCW 79.90.475. Nothing in this section shall confer upon, create, or recognize in any abutting owner any right or privilege in or to any strip of waterway abutting any street and between prolongations of the lines of such street, but the control of and the right to use such strip is hereby reserved to the state of Washington, except as authorized by RCW 79.90.475.

RCW 79.93.050: Excavation of waterways--Waterways open to public--Tide gates or locks.

All waterways excavated through any tide or shore lands belonging to the state of Washington by virtue of the provisions of chapter 99, Laws of 1893, so far as they run through said tide or shore lands, are hereby declared to be public waterways, free to all citizens upon equal terms, and subject to the jurisdiction of the proper authorities, as otherwise provided by law: PROVIDED, That where tide gates or locks are considered by the contracting parties excavating any waterways to be necessary to the efficiency of the same, the department of natural resources may,

in its discretion, authorize such tide gates or locks to be constructed and may authorize the parties constructing the same to operate them and collect a reasonable toll from vessels passing through said tide gates or locks: PROVIDED FURTHER, That the state of Washington or the United States of America can, at any time, appropriate said tide gates or locks upon payment to the parties erecting them of the reasonable value of the same at the date of such appropriation, said reasonable value to be ascertained and determined as in other cases of condemnation of private property for public use.

RCW 79.93.060: Vacation of waterways--Extension of streets.

If a waterway established under the laws of this state, or any portion of the waterway, has not been excavated, or is not used for navigation, or is not required in the public interest to exist as a waterway, such waterway or portion thereof may be vacated by written order of the commissioner of public lands upon request by ordinance or resolution of the city council of the city in which such waterway is located or by resolution of the port commission of the port district in which the waterway is located. If the waterway or portion thereof which is vacated is navigable water of the United States, or otherwise within the jurisdiction of the United States, a copy of such resolution or ordinance, together with a copy of the vacation order of the commissioner of public lands shall be submitted to the United States Army Corps of Engineers for their approval, and if they approve, the waterway or portion thereof is vacated: PROVIDED, That if a port district owns property abutting the waterway and the provisions of this section are otherwise satisfied, the waterway, or the portion thereof that abuts the port district property, shall be vacated. Upon such vacation of a waterway, the commissioner of public lands shall notify the city in which the waterway is located, and the city has the right, if otherwise permitted by RCW 79.94.150, to extend across the portions so vacated any existing streets, or to select such portions of the waterway as the city may desire for street purposes, in no case to exceed one hundred fifty feet in width for any one street. Such selection shall be made within sixty days subsequent to the receipt of notice of the vacation of the portion of the waterway. If the city fails to make a selection within such time, or selects only a portion of the waterway, the title of the

remaining portions of the vacated waterway shall vest in the state, unless the waterway is located within the territorial limits of a port district, in which event, if otherwise permitted by RCW 79.94.150, the title shall vest in the port district. The title is subject to any railroad or street railway crossings existing at the time of such vacation.

WAC 332-30-106 Definitions.

(74) "Waterway" means an area platted across aquatic lands or created by a waterway district providing for access between the uplands and open water, or between navigable bodies of water.

WAC 332-30-117: Waterways.

[Note: See below before implementing this WAC.]

(1) Purpose and applicability. This section describes the requirements for authorizing use and occupation of waterways under the department's authority as proprietor of state-owned aquatic lands. This section applies to waterways established in accordance with RCW 79.93.010 and 79.93.020. This section does not apply to uses of Salmon Bay Waterway, or to the East and West Duwamish Waterways in Seattle authorized under RCW 79.93.040.

(2) Priority use. Providing public navigation routes between water and land for conveniences of navigation and commerce is the priority waterway use.

(3) Permit requirement. In order to assure availability of waterways for present and future conveniences of navigation and commerce, moorage (other than transient moorage for fewer than 30 days), and other waterway uses shall require prior authorization from the department. Permits may be issued for terms not exceeding one year if there will be no significant interference with the priority waterway use or short-term moorage. Permits may be issued for terms not exceeding five years for uses listed in subsection (4) of this section in instances in which existing development, land use, ownership, or other factors are such that the current and projected demand for priority waterway uses is reduced or absent.

(4) Permit priority. In cases of competing demands for waterways, the following order of priority will apply:

(a) Facilities which provide public access to adjacent properties for loading and unloading of watercraft;

(b) Water-dependent commerce, as defined in WAC 332-30-115(1), related to use of the adjacent properties;

(c) Other water-dependent uses;

(d) Facilities for nonnavigational public access;

(e) Other activities consistent with the requirements in WAC 332-30-131(4) for public use facilities.

(5) Waterway permits. All necessary federal, state, and local permits shall be acquired by those proposing to use waterways. Copies of permits must be furnished to the department prior to authorizing the use of waterways.

(6) Obstructions. Permanent obstruction of waterways, including filling is prohibited. Structures associated with authorized uses in waterways shall be capable of ready removal. Where feasible, anchors and floats shall be preferred over pilings.

(7) Permit process. Applications for waterway permits will be processed as follows:

(a) Local government review of permit applications will be requested.

(b) Public comment will be gathered through the shoreline permit process, if applicable. If no shoreline permit is required, public comment will be gathered through the methods described in WAC 332-41-510(3).

(c) Applications will be reviewed for consistency with the policy contained in this chapter.

(d) Evaluation will consider existing, planned, and foreseeable needs and demands for higher priority uses in the waterway and in the associated water body.

(8) The department will require waterway permittees to provide security in accordance with WAC 332-30-122(5) to insure the provisions of waterway permits are fulfilled.

(9) Cancellation. Permission to use waterways is subject to cancellation in order to satisfy the needs of higher priority waterway uses. Transient moorage may be required to move at any time. Waterway permits are cancellable upon ninety days' notice when the sites are needed for higher priority uses.

(10) Monitoring. Local governments will be encouraged to monitor waterway use and to report any uses not in compliance with this regulation.

(11) Planning. Planning for waterway use will be encouraged. The shoreline planning process should provide for the long range needs of preferred waterway uses and other state-wide values.

Planning should also consider the availability of other public property, such as platted street ends, to serve anticipated needs.
(12) Existing uses. Existing waterway uses, structures, and obstructions will be reviewed for compliance with this section. Uses not in compliance shall be removed within one year from the date notification of noncompliance is mailed unless the public interest requires earlier removal. Unless early removal is required, removal may be postponed if the department receives a request for vacation of the waterway from the city or port district in accordance with RCW 79.93.060. If the request for waterway vacation is denied, the structure must be removed within six months of mailing of notice of denial or within one year of the original date of notification of noncompliance, whichever is later.
(13) Fees. Waterway permit fees will be determined on the same basis as required for similar types of uses on other state-owned aquatic lands.
(14) Filled areas. Certain waterways contain unauthorized fill material. The filled areas have generally assumed the characteristics of the abutting upland. Nonwater-dependent uses may be allowed on existing fills when there will be no interference with priority or other permitted waterway uses and when permitted under applicable local, state, and federal regulations.

Discussion on waterways

Waterways are designated areas over first class tidelands, usually within surrounding harbor areas, which are reserved for public highway purposes. The primary use of waterways is to allow for "the present and future convenience of commerce and navigation" by providing public navigation routes between deep water and the land inside of the inner harbor line.

Long-term authorization for use of a waterway may be granted only within those waterways where the federal government has established pierhead lines within the waterway, namely the Salmon Bay Waterway and the East and West Duwamish Waterways, as described in RCW 79.93.040. A permit is required to use or occupy the area on the edges of the waterway between the waterway

boundaries and the nearest pierhead line. This permit is much like a standard use authorization. Long-term permits may be granted for the same uses and under the same general conditions as on other state-owned aquatic lands, but they will require more intensive review to ensure they do not conflict with navigation or commerce. The authorization may be issued for up to 30 years, but should generally be written not to exceed 12 years. Long-term permits can be canceled upon 60 days notice for substantial breach of use authorization conditions.

Different rules exist for granting permits in waterways other than those listed above, as described in WAC 332-30-117. However, there is no clear statutory authority for issuing these permits. RCW 79.93.010 states that "All waterways shall be reserved from sale or lease and remain as public highways for watercraft until vacated as provided for in this chapter." RCW 79.93.040 establishes an exception to this, but the exception authorizes permits only where the United States government, through the Army Corps of Engineers, has established pierhead lines. (In fact, the Corps no longer establishes these lines, but the Legislature has never revised the statutes to reflect this.) These statutes create the strong presumption that waterways are to serve only as avenues of transportation, unless other uses are explicitly authorized.

Therefore, the department will not issue future waterway permits under WAC 332-30-117 until the statutory authority is clarified. Existing permits will continue under the terms provided for in WAC 332-30-122. Any person proposing or placing a structure or activity in a waterway should be notified that permits under WAC 332-30-117 will not be granted. If the use or activity is not otherwise appropriately authorized, or if it causes significant damage to state-owned aquatic lands or significant impact on navigation within the waterway, the use or activity will be subject to trespass action. SEE ALSO: Unauthorized uses.